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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No.

HERSCHEL BLUMBERG, *et al.*,

Petitioners,

v.

PRINCE GEORGE'S COUNTY, MARYLAND, *et al.*,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED

I. DOES THE EXISTENCE OF A CONSPIRACY BETWEEN GOVERNMENT ENTITIES TO REVOKE AND THE UNLAWFUL REVOCATION BY SAID GOVERNMENT ENTITIES OF A BUILDING PERMIT AND WATER AND SEWER PERMITS IN WHICH RIGHTS HAVE VESTED VIOLATE FEDERAL CONSTITUTIONAL GUARANTEES

UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND ENTITLE THE PERMIT HOLDER TO THE RETURN OF HIS PERMITS AND DAMAGES?

II. WHERE ADMINISTRATIVE REMEDIES TO REVIEW GOVERNMENTAL ACTIONS ON A BUILDING PERMIT AND SEWER AND WATER PERMITS IN WHICH RIGHTS HAVE VESTED ARE DOUBTFUL, UNKNOWN OR INADEQUATE, DO FEDERAL CONSTITUTIONAL GUARANTEES UNDER THE FIFTH AND FOURTEENTH AMENDMENTS MANDATE AN EXCEPTION TO THE DOCTRINE OF ADMINISTRATIVE REMEDIES?

III. IF THE EXISTENCE OF ADMINISTRATIVE REMEDIES TO REVIEW GOVERNMENTAL ACTIONS ON A BUILDING PERMIT AND SEWER AND WATER PERMITS IN WHICH RIGHTS HAVE VESTED DEPRIVES THE COURT OF JURISDICTION OVER CAUSES OF ACTION IN TORT AND CONFISCATION WHICH ARISE FROM THE SAME FACT SITUATION AND ARE NOT ABLE TO BE CONSIDERED ON ADMINISTRATIVE REVIEW, DOES IT VIOLATE FEDERAL CONSTITUTIONAL GUARANTEES UNDER THE FIFTH AND FOURTEENTH AMENDMENTS?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Parties to the Proceeding	1
Opinions Below	1
Jurisdiction	3
Constitutional Provisions, Statutes and Ordinances	3
Statement of the Case	5
Reasons for Granting the Writ	19
Conclusion	50

TABLE OF AUTHORITIES

Cases:	Page(s)
Agrarian v. Zoning Inspector of Harford County, 262 Md. 329, 277 A.2d 591 (1971) . . .	26
Arnold v. Prince George's County, 270 Md. 285, 311 A.2d 223 (1973)	22,49
Benton v. Maryland, 395 U.S. 784 (1969) . . .	22
Bloom v. State of Illinois, 391 U.S. 194 (1968) . . .	21
Board of Appeals v. Marina Apartments, 272 Md. 691, 326 A.2d 734 (1974) . . .	17,33,35
Board of Com'rs of Anne Arundel County v. Snyder, 186 Md. 342, 46 A.2d 689 (1946) . . .	20
Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1962)	20
Broddie v. Conn., 401 U.S. 371 (1971)	47
Buchanan v. Warley, 245 U.S. 60 (1917)	24
Burns v. Mayor and City Council of Midland, 247 Md. 548, 234 A.2d 162 (1967) . . .	22
Carey v. Baltimore County, 262 Md. 491, 278 A.2d 6 (1971) . . .	22
Carr v. Watkins, 277 Md. 578, 177 A.2d 841 (1962) . . .	22

Page(s)

Chicago, Burlington and Quincy Railroad Company v. City of Chicago, 166 U.S. 226 (1897) . 21

Columbia Real Estate Title Ins. Co. v. Caruso, 39 Md. App. 282, 384 A.2d 468 (1978) . . . 22

County Council for Montgomery County v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975) 20

Fuentes v. Shevin, 407 U.S. 67 (1972) 23

GAI Audio of New York, Inc. v. Columbia Broadcasting System, Inc., 27 Md. App. 172, 340 A.2d 736 (1975) . . . 22

Green v. Washington Suburban Sanitary Comm., 259 Md. 205, 269 A.2d 818 (1970) . . . 23

Greene v. United States, 376 U.S. 149 (1964) 25,39

Gross v. Lopez, 419 U.S. 565 (1975) 23

Gulf, Colorado and Santa Fe Ry. Co. v. Ellis, 165 U.S. 150 (1897) . 48

James v. Prince George's County, ___ Md. ___, 418 A.2d 1173 (1980) 13

Jarvis v. Mayor and City Council of Baltimore, 248 Md. 528, 237 A.2d 446 (1968) . . . 22

Jones v. Union Guano Co., 264 U.S. 171 (1924) . . . 48

Page(s)

Katz v. Washington Suburban Sanitary Commission, 284 Md. 503, 397 A.2d 1027 (1979) . . 18,40,41

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) . . . 23

McKart v. United States, 395 U.S. 196 (1969) . . . 43

McNeese v. Board of Education, 373 U.S. 668 (1963) . . . 25,40

Munn v. Illinois, 94 U.S. 113 (1877) 23

N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers of America, 391 U.S. 418 (1968) 25

Pemberton v. Montgomery County, 340 A.2d 240, 275 Md. 363 (1975) 20

Pennsylvania Coal Co. v. Mahom, 260 U.S. 393 (1922) . . . 23

Poe v. Mayor and City Council of Baltimore, 241 Md. 303, 216 A.2d 707 (1966) . . . 26

Prince George's County, Maryland, et al. v. Herschel Blumberg, et al., 418 A.2d 1155, ___ Md. ___ (1980) . . . 1,2

Prince George's County, Maryland, et al. v. Herschel Blumberg, et al., 44 Md. App. 79, 407 A.2d 1151 2,15

Ross v. Montgomery County, 252 Md. 497, 250 A.2d 635 (1969) 20

Page(s)

Sanner v. Trustees of Sheppard and Enoch Pratt Hospital, 278 F. Supp. 138 (1968) . . 48

Secretary, Dept. of Human Resources v. Wilson, 286 Md. 639, 409 A.2d 713 (1979) . . . 26

Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926) . . . 25,26

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) . . . 23

Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946) . . . 27

Traux v. Corrigan, 257 U.S. 312 (1921) 48

Washington Suburban Sanitary Comm. v. TKU Asso., 281 Md. 1, 378 A.2d 505 (1977) . . . 23

Western Maryland Dairy, Inc. v. Chenowith, 180 Md. 236, 23 A.2d 660 (1942) . . . 22

Constitutional Provisions, Statutes and Ordinances:

United States Constitution, First Amendment . . . 46

United States Constitution, Fifth Amendment . . . 19,21,40, 42,43,46, 47

	Page(s)
United States Constitution, Fourteenth Amendment . .	19,21,40, 42,43,46, 47,48
Article 19, Declaration of Rights of Maryland . . .	47
Statutes:	
Article 41, Section 244-256A, Maryland Code (1957, 1980 Cum. Supp.)	18,41
Article 43, Section 387C(d)3, Maryland Code (1957, 1980 Repl. Vol.)	34
Article 25A, Section 5(U), Maryland Code (1957, 1973 Repl. Vol., 1980 Cum. Supp.) . . .	29,30,31
Courts and Judicial Proceedings Article, Section 3-409, Maryland Code (1957, 1980 Repl. Vol.)	46
Ordinances:	
Article X, Section 1013, Prince George's County Charter (1970)	13
Section 4-230, Prince George's County Code, 1972 . . .	34
Section 4-242, Prince George's County Code, 1972 (§§ 4-140 and 4-141 of 1975 Code) . .	27,28,29, 31,32

PARTIES TO THE PROCEEDING

Petitioners, Marvin and Herschel Blumberg ("Blumbergs"), pray that this Court issue a Writ of Certiorari to review the opinion and order of the Court of Appeals of Maryland filed in this case on August 22, 1980, and denied reconsideration on September 26, 1980. The parties before the Court of Appeals of Maryland were Prince George's County, Washington Suburban Sanitary Commission, William W. Gullett, Winfield M. Kelly, Jr., Marvin Blumberg and Herschel Blumberg.

OPINIONS BELOW

The case before the Court of Appeals of Maryland was captioned Prince George's County, Maryland, et al. v. Herschel Blumberg, et al., No. 147, September Term, 1979. This Opinion, filed August 22, 1980, has not been reported in the Maryland Reports. It is reported in the

Atlantic Reporter, Second Series, as Prince George's County, Maryland, et al. v. Herschel Blumberg, et al., 418 A.2d 1155 (1980). (App., 1-46) The Opinion of the Court of Special Appeals, captioned Prince George's County, Maryland, et al. v. Herschel Blumberg, et al., No. 152, September Term, 1979, is reported at 44 Md. App. 79, 407 A.2d 1151 (1979), and was filed by said Court on November 7, 1979. (App., 47-139) The case before the Circuit Court for Prince George's County, Maryland, was captioned Herschel Blumberg, et al. v. Prince George's County, et al., Equity D-7901, and the oral opinion of the Circuit Court was entered on May 9, 1978, and January 4, 1979. (App., 139-232) On January 30, 1979, the Circuit Court filed an Injunction, Declaration and Decree. (App., 233-236) Copies of all opinions and orders related thereto are reproduced in a separate Appendix to this Petition.

JURISDICTION

The Opinion of the Court of Appeals of Maryland was filed on August 22, 1980. A timely request for reconsideration was filed by petitioners (App., 240-293) and denied by the Court of Appeals on September 26, 1980. (App., 293) Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

Listed below are the citations to Constitutional provisions, statutes and ordinances which this case involves. Due to the length of the verbatim text of these provisions, their pertinent text is set forth in the Appendix to this Petition at pps. 296-313.

Constitutional Provisions:

1. First Amendment, Constitution of the United States.

2. Fifth Amendment, Constitution of the

United States.

3. Fourteenth Amendment, Constitution of the United States.

4. Art. 19, Declaration of Rights of Maryland.

Statutes:

1. Article 25A, § 5(U), Maryland Code (1957, 1973 Repl. Vol., 1980 Cum. Supp.)

2. Article 41, § 244-256A, Maryland Code (1957, 1980 Cum. Supp.)

3. Courts and Judicial Proceedings Article, § 3-409, Maryland Code (1980 Repl. Vol.)

4. Article 43, § 387C(d)3, Maryland Code (1957, 1980 Repl. Vol.)

Ordinances:

1. Article X, § 1013, Prince George's County Charter (1970)

2. Section 4-230, Prince George's County Code, 1972

3. Section 4-242, Prince George's

County Code, 1972 (§§ 4-146 and 4-141, 1975 Code)

STATEMENT OF THE CASE

The Blumbergs are owners of a large tract of land in Hyattsville, Prince George's County, Maryland, which they have developed with mixed office, retail and residential uses. As part of this development, the Blumbergs have planned to construct a high-rise residential building ("Plaza Towers") since 1958. In 1971, aware of governmental restrictions regarding sewer service, the Blumbergs confirmed that service would be available to Plaza Towers with the Washington Suburban Sanitary Commission ("WSSC"), the water and sewer agency servicing the County. Assured that service would be available, the Blumbergs made formal application to WSSC for water and sewer service which was granted on October 25, 1972. On November 13, 1972, plumbing permits for Plaza Towers were issued by the WSSC.

On October 6, 1972, the Blumbergs filed an application with Prince George's County ("County") for a building permit for Plaza Towers. On October 17, 1972, the Prince George's County Council ("Council") adopted a bill providing for the licensure of building contractors and sent it to then County Executive William W. Gullett ("Gullett") for signature. Gullett signed the bill on November 1, 1972, and it took effect on January 1, 1973. Any person furnishing character references, evidence of financial responsibility, training and experience, and a $25.00 fee was entitled to a license. No examination was required. The bill did not declare any permit inappropriately issued to be invalid. The only sanction provided was a criminal penalty for doing business as a contractor without a license.

On January 25, 1973, the County issued a building permit to the Blumbergs for the construction of Phase I of Plaza Towers. A second building permit, for Phase II, was issued on

February 23, 1973. Thereafter, on March 14, 1973, the building permits were merged by the County into a single building permit.[1] Each of the permits were issued based upon a written application showing the contractor to be the Blumbergs. Although the County Department of Licenses and Permits was responsible for issuing both building permits and contractor's licenses, no question was ever raised about the Blumbergs not being licensed. By word of mouth, the Blumbergs heard that the County might take their building permit and use the license law to do so. Therefore, the Blumbergs filed an application, dated March 28, 1973, for a building contractor's license. On April 5, 1973, the Blumbergs received a temporary license and, on April 17, 1973, a permanent license.

On March 29, 1973, construction of Plaza

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[1]The building for which the building permit was issued contained two towers: the first tower consisted of a 35-story apartment tower, parking garage, lobby and penthouses and, the second, a 27-story apartment tower, parking garage, lobby and penthouses.

Towers commenced. Excavation for the structure was completed and a huge concrete mat foundation poured. The first footing was poured on March 30, 1973, and footings continued to be poured every day or every other day with the County regularly inspecting and approving all work done.

On April 12, 1973, the County served the Blumbergs with a stop work order. This order was followed by a letter dated April 12 from the Chief Building Inspector advising that the building permit had been "illegally issued" because the contractor listed on the permit "does not possess a valid residential building contractor's license" and, therefore, "[t]he permit is . . . null and void". The letter also stated that upon proof of licensure, the permit would be reissued. The Blumbergs immediately notified the County that they were licensed contractors.

After receiving objections to the height and density of Plaza Towers from certain citi-

zens' groups and despite the findings of its general counsel that the WSSC had properly authorized the issuance of water and sewer permits for Plaza Towers, on April 11, 1973, the WSSC ordered the "efficacy" of the water and sewer permits suspended. The WSSC's actions occurred subsequent to the receipt by its Chairman of a phone call from an agent of William Gullett. The WSSC Chairman was advised by Gullett that a decision had been made to recall the building permit and "that we [WSSC] should follow suit". Therefore, without notice to the Blumbergs, the WSSC adopted an Order, completely contrary to the County's letter of April 12 to the Blumbergs, suspending the efficacy of the water and sewer permits and stating that (1) the County Executive [Gullett] had withdrawn the building permit for Plaza Towers and advised that he planned to recirculate the permit to the WSSC and (2) the WSSC would consider all questions raised with regard to the water and sewer permits, including current

sewer flow data, at the time of this further review. Subsequent to the WSSC's action, its Chairman called Gullett's office and advised that the WSSC had acted upon his request. Thereafter, on April 19, 1973, the Chief Building Inspector sent a second letter to the Blumbergs stating that in addition to the contractor's license, the Blumbergs would have to resolve the suspension of their water and sewer permits prior to the reissuance of their building permit.

The Blumbergs met with Gullett, who told them that the height of the building was the real problem. Convinced they had no choice, the Blumbergs offered to reduce the height, and Gullett represented that the building permit would be issued if the height were reduced to two 27-story towers. On May 8, 1973, the Blumbergs filed an application for a revised building permit. When this application was not processed, the Blumbergs contacted Gullett, who stated that the WSSC was the cause of the

delay and that he could do nothing about it.

On May 23, 1973, the WSSC held a meeting regarding the suspension of the water and sewer permits. Then, on May 30, 1973, the WSSC issued an order revoking the permits. Prior to this action, the Chairman of the WSSC received a phone call from the Council advising of certain councilmembers' opposition to Plaza Towers. A letter expressing this opposition followed. The Chairman of the WSSC testified that he understood the verbal request to be a direction from the Council that no water and sewer permit should be issued for Plaza Towers and that the revocation of the water and sewer permits was the result. Without water and sewer permits, the building permit could not be reissued under County and State law and by the terms of the County's April 19, 1973, letter.

On July 10, 1973, the Blumbergs filed a bill of complaint naming the County, WSSC and Gullett as defendants and seeking the return of the water and sewer and building permits. In

October, 1976, an amended bill was filed seeking the return of the permits and damages.[2] The Blumbergs alleged that they had acquired vested rights in their permits and that the actions of the defendants constituted a deprivation of property without due process and equal protection of law and amounted to a taking of their property without compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. (App., 323-324; 107) The Circuit Court directed the County and WSSC to reissue the permits, awarded judgment for $3,673,919.00 against the County and in favor of the Blumbergs, sustained demurrers by Gullett and Kelly and dismissed the action for damages against the WSSC on the ground of sovereign immunity. (App., 233-236)

The Circuit Court found that the County, which had waived its immunity in tort by sta-

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[2]The amended bill also added Winfield M. Kelly, Jr. ("Kelly"), then County Executive, as a defendant.

tute (Art. X, § 1013, Prince George's County Charter (1970)), was liable in damages for tortious interference with the Blumbergs' vested property rights, conspiracy to commit same and taking of private property without compensation.[3] (App., 139-198) In describing the reason for revoking the permits, the Circuit Court stated:

> "We conclude that the building permit in this case was improperly revoked. It was a valid permit when it was issued. It was subterfuge, under which it was revoked, and there was no legal significance, no practical effect, no basis for that action, except as an excuse to stop a project which the Executive, at that time, had come to believe was politically unpopular with the people in the area. It was unpopular with the people in the area, and therefore politically unprofitable to him." (App., 188-189)

The Circuit Court continued:

> "What happened in that case was that

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[3]By Art. X, § 1013 of its Charter, the County waived its liability for any action for which it would be directly liable in tort and for any conduct of its officials, employees and agents which would be actionable "... notwithstanding the status or personal amenability to suit of the individual agent who commits the tort." James v. Prince George's County, ___ Md. ___, 418 A.2d 1173, 1181 (1980).

the County didn't really have any firm grounds about this permit thing. That, obviously, was the flimsiest, plainest sort of subterfuge. The only advantage it had was that it was immediate. It stopped right where you are, whereas the action by the Sanitary Commission had to have a little bit more deliberation, or two more people were involved in it. Who knows. Maybe somebody down at the Sanitary Commission would say, 'Don't do this. It's wrong.'

So having stopped the project immediately, it then instructed somebody from the Sanitary Commission to withdraw or do something to say that he doesn't have sewerage, and the Commission, in response to that, did something of what they call suspending the efficacy of the permits which, in effect, says you don't have sewerage any more, and then, eventually, they come up with this business about the fact that they were illegally issued, and therefore, they were void, and therefore, we are sorry but you don't have sewerage any more.

We don't think that government ought to act with such a demonstrated lack of integrity, and we think that the principal of law that a person has the vested right in a permit such as this was designed to protect the citizen who does everything that he is supposed to do from the arbitrary and capricious whims of political winds in the area." (Emphasis supplied; App., 178-180)

The Court of Special Appeals, commencing its opinion with the statement: "This is a case of government running amok", found that the evidence fully supported the Circuit Court's findings.

> "There is no question that Gullett orchestrated what occurred, that he had no authority whatever to do it, that he did it for wholly improper reasons, and that he did it deliberately, knowing full well the consequences of his action. The evidence fully supports the court's conclusions that he acted arbitrarily, capriciously, with lack of integrity, and for improper motives." (App., 105)

The Court of Special Appeals affirmed all actions of the Circuit Court except the Court's calculation of damages against the County and its determination that the WSSC was immune. The Court of Special Appeals remanded this portion of the case to the Circuit Court with instructions (i) that $1.5 million was not an appropriate element of damages, (ii) to redetermine by clarifying $1.8 million of the damage award, and (iii) to determine whether and to what extent a judgment for damages should be

entered against the WSSC.

The Court of Appeals granted certiorari to review, inter alia, the contention of the County that the Circuit Court lacked jurisdiction over the case because the Blumbergs had failed to appeal the actions of the County on the building permit to the County Board of Appeals ("Board").[4] This contention had been raised by the County for the first time at trial in its verbal motion to dismiss at the close of the Blumbergs' evidence. The Circuit Court rejected the contention as did the Court of Special Appeals, both finding the statutory jurisdiction of the Board to be highly questionable and the remedy, if it existed, to be entirely inadequate. This was so since the

[4]The Court of Appeals granted certiorari on eight other issues: (1) liability of the County in damages to the Blumbergs, (2) application of the statute of limitations to the Blumbergs claim for damages and application of statutory provisions requiring notice to the County of a suit for liquidated damages, (3) possible maximum limitation by statute of the liability of the County to damages, (4) action of Court of Special Appeals on demurrers of Gullett and Kelly, (5) and (6) rulings of Court of Special Appeals on two aspects of the calculation of damages, (7) immunity of the WSSC from damages, and (8) reissuance of the water and sewer permits.

Board of Appeals, as found by the Court of Appeals of Maryland in Board of Appeals v. Marina Apts., 272 Md. 691, 326 A.2d 734 (1974), had no authority whatsoever over the WSSC and could not, therefore, order the return of the water and sewer permits, a prerequisite to the reissuance of the building permit and to the construction of the building.

The Court of Appeals concluded that the Blumbergs had failed to exhaust "available" administrative remedies and dismissed the case against the County and the WSSC without reaching the merits. Thus, the Court of Appeals found that despite the fact that (i) the law prohibited the grant of a building permit when no water and sewer permit had been issued, (ii) the Board had no authority to reissue the water and sewer permits, and (iii) even if it is assumed that the building permit could have been issued by the Board irregardless of County and State prohibitions against it, the building permit would have been worthless since the

building could not be built without a water and sewer permit, the administrative remedy of appeal to the Board was not so inadequate as to authorize judicial intervention before exhaustion. The Court of Appeals further concluded that the action should be dismissed against the WSSC for failure to exhaust administrative remedies although the WSSC never raised the issue, since in a 1979 Court of Appeals opinion, Katz v. Washington Suburban Sanitary Commission, 284 Md. 503, 397 A.2d 1027 (1979), the WSSC was declared a State agency. Therefore, the Court found that as a State agency, the State Administrative Procedures Act ["APA": See Article 41, § 244-256A, Maryland Code (1957, 1978 Repl. Vol.)] was applicable to the WSSC and, although the WSSC had not been treated as a State agency for purposes of the APA prior to 1979, the Blumbergs should have followed this procedure in 1973.

On September 19, 1980, the Blumbergs filed a motion for reconsideration again raising the

violations of their federal constitutional rights if the doctrine of administrative remedies is applied as the Court of Appeals has done in this case. (App., 240-292) This motion was denied by the Court of Appeals on September 26, 1980. (App., 293)

REASONS FOR GRANTING THE WRIT

The decision below conflicts with decisions of this Court as to (i) violations of the constitutional provisions against deprivation of property by a State without due process of law and taking of property without compensation, and (ii) the proper application of the doctrine of administrative remedies.

A. The existence of a conspiracy to revoke and the unlawful revocation by the County and WSSC of the Blumbergs' building permit and sewer and water permits in which the Blumbergs' rights had vested violates the Blumbergs' constitutional rights under the Fifth and Fourteenth Amendments and entitles the Blumbergs to

the return of their permits and to damages for the violations.

Under Maryland law, the Blumbergs acquired vested rights in their building permit and water and sewer permits. Property rights are not created by the Constitution.

> "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1962).

The test in Maryland to determine if one has acquired a vested right in a permit is (1) whether a permit has been obtained and (2) whether one has proceeded under the permit to exercise their rights on the land by commencement of construction. County Council for Montgomery County v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975); Pemberton v. Montgomery County, 340 A.2d 240, 275 Md. 363 (1975); Board of Com'rs of Anne Arundel County v. Snyder, 186 Md. 342, 46 A.2d 689 (1946); Ross v. Mont-

gomery County, 252 Md. 497, 250 A.2d 635 (1969).

Applying this test to the facts of the instant case demonstrates that the Blumbergs, as found by the Circuit Court and Court of Special Appeals, had unequivocably acquired vested rights in their permits. The Fifth and Fourteenth Amendments forbid both the Federal Government and State Government from depriving any person of property without due process of law. Bloom v. State of Illinois, 391 U.S. 194 (1968). The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, Chicago, Burlington and Quincy Railroad Company v. City of Chicago, 166 U.S. 226 (1897), prohibits not only the deprivation of property without due process of law, but also, the taking of property without just compensation.

Once it is determined that a guarantee of the bill of rights is fundamental to the American scheme of justice, the same con-

stitutional standards apply with reference to both the State and Federal Governments. Benton v. Maryland, 395 U.S. 784 (1969).

The actions of the County and WSSC in revoking the Blumbergs' permits constituted a deprivation of private property without due process of law, tortious interference with the Blumbergs' vested property rights and a taking without compensation. Arnold v. Prince George's County, supra; Carey v. Baltimore County, 262 Md. 491, 278 A.2d 6 (1971); Jarvis v. Mayor and City Council of Baltimore, 248 Md. 528, 237 A.2d 446 (1968); Burns v. Mayor and City Council of Midland, 247 Md. 548, 234 A.2d 162 (1967). In addition, the confederation of the County and WSSC to stop the project, an unlawful act, constituted an actionable conspiracy for which the County and WSSC are liable in damages. GAI Audio of New York, Inc. v. Columbia Broadcasting System, Inc., supra; Columbia Real Estate Title Ins. Co. v. Caruso, 39 Md. App. 282, 384 A.2d 468 (1978); Western

Maryland Dairy, Inc. v. Chenowith, 180 Md. 236, 23 A.2d 660 (1942); Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962); Washington Suburban Sanitary Comm. v. TKU Asso., 281 Md. 1, 378 A.2d 505 (1977); Green v. Washington Suburban Sanitary Comm., 259 Md. 205, 269 A.2d 818 (1970).

The action of the Court of Appeals in dismissing the case against the County and WSSC for failure to exhaust administrative remedies and sustaining the judgment of the Court of Special Appeals as to Gullett and Kelly denies the Blumbergs the aforestated protections of the Fifth and Fourteenth Amendments. It is fundamental that vested rights are property rights protected by the guarantees of the Fifth and Fourteenth Amendments. Fuentes v. Shevin, 407 U.S. 67 (1972); Gross v. Lopez, 419 U.S. 565 (1975); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Pennsylvania Coal Co. v. Mahom, 260 U.S. 393 (1922); Lynch v. Household Finance Corp., 405 U.S. 538 (1972); Munn v.

Illinois, 94 U.S. 113 (1877); Buchanan v. Warley, 245 U.S. 60 (1917). Here is a case where two courts found that (i) a conspiracy existed between the County and WSSC to unlawfully deprive the Blumbergs of a property right without due process of law and without compensation, (ii) that the Blumbergs were deprived of a property right without due process of law and without compensation, and (iii) that the Blumbergs suffered substantial damages as a result.

The decision of the Court of Appeals denies all relief to the Blumbergs and thereby operates to affirm a proven deprivation of property without due process of law and a taking without compensation in complete contravention to applicable decisions of this Court. Thus, fundamental federal rights have not only been openly and maliciously violated by the County and WSSC, but also, the Blumbergs have been, by the decision of the Court of Appeals, denied their federal constitutional protec-

tions against these blatent violations. For these special and important reasons, this Court should grant certiorari to review the decision of the Court of Appeals in this case.

B. Where purported administrative remedies to review the actions of the County and WSSC on the Blumbergs' building permit and sewer and water permits are doubtful, unknown and inadequate, constitutional due process and prohibition against the taking of property without compensation mandates an exception to the doctrine of administrative remedies.

This Court holds that impossibility or improbability of obtaining adequate relief is a reason for dispensing with the exhaustion requirement. N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers of America, 391 U.S. 418 (1968); Greene v. United States, 376 U.S. 149 (1964); McNeese v. Board of Education, 373 U.S. 668 (1963); Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926). The same exception is recognized by the Court of Appeals of

Maryland. Poe v. Mayor and City Council of Baltimore, 241 Md. 303, 216 A.2d 707 (1966); Agrarian v. Zoning Inspector of Harford County, 262 Md. 329, 277 A.2d 591 (1971); Secretary, Dept. of Human Resources v. Wilson, 286 Md. 639, 409 A.2d 713 (1979).

In Smith v. Illinois Bell Tel. Co., supra, this Court indicated that the reason for the exception is to protect a complainant's constitutional rights.

> "Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to awart a decision of the rate making tribunal before applying to a federal court for equitable relief." (270 U.S. 587, 591-592)

In like manner, this Court holds that where there is such uncertainty concerning the adequacy of a State remedy as to make it speculative whether that remedy affords full protection of federal rights, exhaustion will not be

required. Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946). The decision below thus conflicts with applicable decisions of this Court dispensing with the exhaustion requirement when the remedy is doubtful, unknown or inadequate.

In the instant action, the Court of Appeals, contrary to the Circuit Court and Court of Special Appeals, found that an administrative remedy existed with regard to the actions of the County concerning the Blumbergs' building permit and that the existence of this administrative remedy, an appeal to the County Board of Appeals ("Board"), deprived the Circuit Court of jurisdiction. As a result, the Court of Appeals dismissed the case against the County. The holding of the Court of Appeals regarding the existence of an administrative remedy rests on its determination that § 4-140 of the County Code[5], providing for appeals to

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[5]Cites are to the most recent (1975) Prince George's County Code, unless a material change since 1972 has occurred.

the Board, does not limit the jurisdiction of the Board to appeals from decisions of the Building Official refusing to grant a modification of a requirement of the Basic Code or Subtitle 4 of the County Code ("Buildings Chapter"). The Court of Appeals found that the second sentence of § 4-140: "[a]pplication for appeal may be made when it is claimed that: The true intent of the Basic Code or this Ordinance [Buildings Chapter] has been incorrectly interpreted or applied", permits appeals by an aggrieved party from <u>all</u> decisions of the Building Official with regard to building permits, including not only refusals to modify the Basic Code or Buildings Chapter, but also, issuance, revocation, suspension and amendment

of a building permit.[6]

Prince George's County as a charter county may exercise only those legislative powers expressly granted to it pursuant to the Express Powers Act, Md. Code (1957, 1973 Repl. Vol., 1980 Cum. Supp.). Article 25A, Section 5(U), Maryland Code (1957, 1973 Repl. Vol., 1980 Cum. Supp.), specifically delegates to chartered counties the authority to enact local laws to provide for a county board of appeals to review certain specified actions of an administrative officer or agency. In pertinent part, this Section grants and confers upon said counties the power

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[6]Section 4-140 provides:

> "The owner or occupant of a building or structure or any directly aggrieved person may appeal to the board of appeals from a final decision of the Building Official refusing to grant a modification of the provisions of the Basic Code or this Ordinance. Application for appeal may be made when it is claimed that: The true intent of the Basic Code or this Ordinance has been incorrectly interpreted or applied, notice of such appeal shall be in writing and filed within thirty (30) days after the decision is rendered by the Building Official." (Emphasis supplied)

> "[t]o enact local laws providing (1) for the establishment of a county board of appeals . . . and (4) for the decision by the board on petition by any interested person . . . of such of the following matters arising (either originally or on review of the action of an administrative officer or agency) under any law, ordinance, or regulation of . . . the county council, as shall be specified from time to time by such local laws enacted under this subsection: . . . the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval, exception, waiver, certificate, registration, or other form of permission or any adjudicatory order . . ." (Emphasis supplied)

Section 5(U) is an authorization. If the entitlement of § 5(U) is exercised, the statute requires the enactment of local legislation to (1) establish a board of appeals and (2) specify which of the enumerated matters in § 5(U), i.e., issuance, denial, revocation, suspension, annulment, or modification, the board is to review. The County, by § 2-111 of the County Code, created a Board of Administrative Appeals "to hear and determine all administrative appeals allowed by ordinance or law,"

excepting three situations not here relevant. Section 4-140 of the County Code provides for an appeal to the Board "from a final decision of the Building Official refusing to grant a modification of the provisions of the Basic Code or this Ordinance." See footnote, p. 29, supra. Thus, § 4-140 specifies only "modification" and excludes any reference to the issuance, renewal, denial, revocation, suspension or annulment of a permit. See Article 25, Section 5(U). Since no local law was enacted under the Buildings Chapter as required by Article 25A, § 5(U), to grant the Board authority to review anything other than a refusal to grant a modification, the Board had no authority to review the actions of the County in this case.

Further, when a requested modification has been denied, an aggrieved person may appeal to the Board when he contends "[t]hat the true intent of the Basic Code or of this Ordinance has been incorrectly interpreted or

applied". See § 4-140. This does not extend the jurisdiction of the Board to review stop work orders or declarations by the Building Official that a building permit previously issued is null and void, matters at issue in this case, but rather allows an aggrieved person, i.e., one who has been denied a modification of the Building Code or Buildings Chapter to argue that the Board is not bound by the literal terms of the Ordinance but may modify such terms by considering the Ordinance as a whole in order to effect the intent thereof. Thus, the second sentence of § 4-140 of the County Code does not extend the jurisdiction of the Board, as found by the Court of Appeals, but merely allows an applicant, whose very case is founded upon a request to do other than the express language of the legislation permits, to free himself from the established principle of law that the intent of the legislature is first to be found in the express language of the legislation.

The Blumbergs contend that for the above reasons, no administrative remedy existed to review the actions of the County. However, if it is assumed for the sake of this argument that an appeal to the Board as found by the Court of Appeals existed to review the actions of the County, the remedy was entirely inadequate necessitating an exception to the doctrine to protect the Blumbergs' federal constitutional rights. All parties and the Court of Appeals of Maryland acknowledge that under Board of Appeals v. Marina Apartments, supra, the Board has no jurisdiction over the WSSC and cannot, therefore, countermand a decision of the WSSC with regard to sewer service. This leaves the Board powerless to require the return of sewer and water permits if revoked by the WSSC. Despite this infirmity, the Court of Appeals concluded that the Blumbergs were required to "follow the exclusive review procedures of Prince George's County with regard to the Building Official's actions". The Court

found that although the Board had no jurisdiction to review the actions of the WSSC, this did not make an appeal to the Board inadequate, or excuse its use. Thus, it is concluded that the Board could have ordered the restoration of the Blumbergs' building permit despite the revocation of the sewer and water permit contrary to County and State law which required a sewer permit to issue prior to the issuance of the building permit. See Art. 43, § 387C(d)3, Maryland Code (1957, 1980 Repl. Vol.) and § 4-230, Prince George's County Code, 1972.[7]

The patent injury to the Blumbergs which results from the Court's finding that the declared administrative remedies were available and adequate belie the validity of the existence of this exception and conflict with decisions of this Court on the application of

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[7] As to Art. 43, § 387C(d)3, it is noted that Chapter 618, Acts of 1975, effective July 1, 1974, added all of subsection 3 of subsection (d) following the first sentence therein. This, however, did not change or expand the provision but merely elaborated on the requirement as stated therein.

the doctrine by administrative remedies. If this case does not present a situation where administrative remedies, if found to exist, are inadequate, then there is no case where such a finding can be made. Here is a situation where the law prohibited the grant of a building permit if a sewer and water permit had not been issued. At a time when strict moratoria existed throughout the County, and in view of Board of Appeals v. Marina Apartments, supra, there is no reason to believe that the Board would have the authority to circumvent the findings of the WSSC that sewer service was not adequate to serve Plaza Towers and reissue the building permit.

Further, even if it is assumed that the building permit could have been issued by the Board irregardless of County and State prohibitions against it, the permit would be entirely worthless. The building could not be built without a sewer and water permit. The Court of Appeals concluded that an administra-

tive remedy is not so inadequate to authorize judicial intervention before exhaustion "because it is intended with delay, expense, annoyance, or even some hardship". The facts of this case as found by both the Circuit Court and Court of Special Appeals as they relate to administrative remedies create a situation which goes far beyond mere inconvenience, annoyance, or some hardship if administrative remedies are followed. Actual malice was found on the part of William Gullett, County Executive of Prince George's County, with regard to his actions in stopping the Blumbergs' project, as well as a conspiracy between the County and WSSC to unlawfully stop the project, a project in which the Blumbergs had obtained vested rights. The sewer and water permits were not revoked because of any "mistake" by the WSSC concerning the application of its own resolutions; the sewer and water permits were not revoked because of any inadequacy of treatment capacity; the sewer and water permits were re-

voked because Gullett instructed the WSSC to revoke them and the WSSC acquiesced in this improper, illegal and malicious action. The building permit was not revoked because of the existence of a "building contractor's law" but solely on the basis of political pressure. This is what the proof showed, this is what the Circuit Court found, and this is what the Court of Special Appeals affirmed.

This is hardly a case where "some hardship" is entailed by following an administrative remedy. The project was a $27 million project on which all architectural and engineering work was completed, subcontracts for construction let and construction firmly and in good faith under way. In view of a factual backdrop of admitted malice and conspiracy between public bodies to deprive the Blumbergs of vested property rights, to hand the Blumbergs a useless building permit valid for six months only and to require them to pursue the WSSC, a co-conspirator and joint tort-feasor, in a se-

cond administrative proceeding (the existence of which would not be known to the general public for many years - see pp. 40-43) simply cannot be found to present "effective", "available" or "adequate" administrative remedies for the protection of the Blumbergs' federal constitutional rights - not in 1973 and not to the Blumbergs on the facts of this case.

The doubt associated with the jurisdiction of the Board to afford any relief whatsoever, and, even if a remedy was available from the Board, the incomplete nature of it to protect the Blumbergs' constitutional rights under the Fifth and Fourteenth Amendments, coupled with the fact that the application of the Administrative Procedures Act to the WSSC was not known, when weighed against the actions of the County and WSSC, illustrative of the worst in abuse of governmental power, go well beyond the degree of hardship and inconvenience that can be associated with an administrative remedy before a finding of inadequacy is made.

Such does not amount to mere inconvenience or some hardship but deprives the Blumbergs of their constitutional protections against deprivation of property without due process of law and against the taking of property for public use without compensation through doubtful and inadequate paper exercises.

In Greene v. United States, supra, this Court found certain administrative remedies to review a claimant's eligibility for monetary restitution under Department of Defense regulations were inadequate and need not be followed. The Court stated:

> "Since in this case the only available administrative procedure entailed the burden of presenting a claim under an inapplicable and substantially revised regulation, that procedure must be regarded as inappropriate and inadequate and therefore need not be pursued." (376 U.S. 149, 164)

Thus, the Court of Appeals' decision in the instant action conflicts with decisions of this Court as to the proper application of the doctrine of administrative remedies.

The Blumbergs asserted that the actions of the County and WSSC deprived them of property without due process of law and constituted a taking without compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Since Maryland law does not provide the Blumbergs with an administrative remedy sufficiently adequate for protection of their federal constitutional rights, their protection requires an exception to the doctrine of administrative remedies. McNeese v. Board of Education, supra.

Although never raised by the WSSC, the Court of Appeals concluded that the suit against the WSSC must also be dismissed for failure to exhaust administrative remedies. In Katz v. WSSC, supra, decided by the Court of Appeals in 1979, it was held that the WSSC is an agency of the State. Therefore, the Court of Appeals concluded below that the WSSC's procedures are governed by the State Administra-

tive Procedures Act, Article 41, §§ 244-256A, Maryland Code (1957, 1978 Repl. Vol., 1980 Cum. Supp.) ("APA") and that the Blumbergs should have appealed the actions of the WSSC to the Circuit Court under the APA. Thus, this appeal would have had to have been taken in 1973, six years before the Court of Appeals held in Katz that the WSSC should be treated as an agency of the state. Prior to Katz, and certainly in 1973, the WSSC was not considered an agency of the state for purposes of the application of the APA.

It has long been said that the rule requiring exhaustion of remedies is supported by sound reasons. Fundamentally, these reasons deal with the fact that an administrative agency with its expertise is the most efficient and effective body to deal with an issue in its purview. This and the known jurisdiction of an agency to determine the issues raised by an appeal are what make an administrative remedy effective and adequate. However, none of these

reasons are present when the status of the WSSC is examined in 1973. There was no comprehensive remedial scheme established for administrative review. There was no intermediate administrative appeal, no board of review, no mechanism whatsoever for the expertise of the agency to be exercised on an appellate level, thus defeating the underlying reason and purpose for the exhaustion doctrine. Since no one was aware that the WSSC would be constituted an agency of the state for purposes of the application of the APA, no structure whatsoever existed to effectuate the requirements of the APA.

An administrative remedy is not adequate to protect the Blumbergs' Fifth and Fourteenth Amendment rights, if it was not known to exist, would not be known to exist for several years, and was not acknowledged or practiced by the very agency in question. An administrative remedy is not adequate to protect the Blumbergs' Fifth and Fourteenth Amendment

rights when no procedures, as mandated by the APA, are enacted by the agency to allow for and to provide a record that may be reviewed on appeal and to assure a fair hearing. An administrative remedy is not adequate to protect the Blumbergs' Fifth and Fourteenth Amendment rights if, by lack of procedures, standards and review, each and every purpose cited by this Court for the existence of the doctrine of exhaustion of administrative remedies is defeated. McKart v. United States, 395 U.S. 196 (1969). Such is the situation in the instant case. There existed no available, adequate and effective administrative remedy to review the actions of the WSSC in this case.

C. The purported existence of administrative remedies relating to the review of the actions of the County and WSSC on the Blumbergs' building permit and sewer and water permits (i) were not exclusive and (ii) did not deprive the Court of jurisdiction over causes of action for damages in tort and confiscation

which arise from the same fact situation.

If, contrary to the position of the Blumbergs, administrative review of the actions in the County and WSSC was available to the Blumbergs, such review was not exclusive and the Circuit Court did not err in exercising jurisdiction over this case. The County did not raise the defense of exhaustion of administrative remedies until the close of the Blumbergs' case. At no time did the WSSC raise the exhaustion doctrine. Thus, the application of the doctrine must be determined based on the evidentiary record made. Based on the record, not only did the Blumbergs establish facts entitling them to the declaratory and injunctive relief prayed with regard to the permits, but also, facts entitling them to receive damages. The Blumbergs' damage claims are independent from the issue of whether their permits should be restored. To recover damages, the Blumbergs are not required to exhaust administrative remedies but only to establish that there had

been one of the following: (i) tortious interference with their vested property rights, (ii) a civil conspiracy, (iii) a deprivation of their property without due process or (iv) a taking of private property without compensation.

The Board of Appeals or the Circuit Court under the APA has no authority to render a binding judgment or to award damages. Damage claims such as the Blumbergs' are cognizable in the Circuit Court as an original matter. If the reasoning of the Court of Appeals with regard to the availability of administrative remedies is accepted, then the case also raises issues, through its claims for declaratory relief, which relate to subject matter falling within the special expertise of an administrative agency. However, since the tort and constitutional claims presented are plainly matters of which the Circuit Court has jurisdiction, even if it is assumed that administrative remedies existed to review the question of restoration of the permits, jurisdiction to

issue declaratory relief and to restore the permits was shared between the Board of Appeals and Circuit Court. Thus, the Circuit Court properly awarded declaratory relief pursuant to Courts and Judicial Proceedings Article, § 3-409(c), Maryland Code (1980 Repl. Vol.), wherein it is stated:

> "A party may obtain a declaratory judgment or decree notwithstanding a concurrent common law, equitable, or extraordinary legal remedy, whether or not recognized or regulated by statute." (Emphasis supplied)

However, again assuming that administrative remedies existed to review the questions raised concerning the restoration of the Blumbergs' permits and these remedies were exclusive with no exception to the doctrine applicable, the Blumbergs were denied access to the courts to assert their damage claims in violation of the guarantees of the First, Fifth and Fourteenth Amendments to the Constitution of the United States. Despite the power of the Circuit Court to restore the permits, the Court had original jurisdiction of the damage claims

presented and these claims must not be dismissed on the basis of the exhaustion doctrine. To do so is to deny the Blumbergs access to the courts to assert their tort and constitutional claims and to deprive the Blumbergs of property without due process of law or compensation in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States. Broddie v. Conn., 401 U.S. 371 (1971).

The Fourteenth Amendment provides that "[n]o State shall deprive any person of life, liberty, or property, without due process of law . . ."

Article 19 of the Declaration of Rights of Maryland guarantees a remedy to all persons for injury to property.

> "That every man, for an injury done to him in his person or property, ought to have a remedy by the course of the Law of the land, and ought to have justice and right, freely without fail, fully without any denial, and speedily without delay according to the Law of the Land."

The rights guaranteed by Article 19 and the Fourteenth Amendment are the same.

Sanner v. Trustees of Sheppard and Enoch Pratt Hospital, 278 F. Supp. 138 (1968).

The power of the legislature to impose conditions upon the right to turn to the courts for redress of grievances must be exercised within constitutional limits. Jones v. Union Guano Co., 264 U.S. 171 (1924). As stated by this Court in Jones,

> "[t]he Fourteenth Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of the distinction is real and the condition imposed has reasonable relation to a legitimate object."[8] (Emphasis supplied)

The exhaustion doctrine in this case, therefore, if considered applicable, pertains only to the "suit of specified kind or class", i.e., whether the Blumbergs' permits should be restored. This decision, strictly limited to the question of the restoration of the permits, is not a condition precedent to bringing an action for conspiracy, tortious

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[8] See also Gulf, Colorado and Santa Fe Ry. Co. v. Ellis, 165 U.S. 150 (1897); Traux v. Corrigan, 257 U.S. 312 (1921).

interference with vested property rights, deprivation of property without due process of law or a taking without compensation associated with the bad faith actions of government. Such causes of action are recognized under Maryland law and protected by the Federal Constitution. Arnold v. Prince George's County, 270 Md. 285, 311 A.2d 223 (1973). If the Blumbergs are denied access to the courts with regard to their tort and constitutional claims, which claims are independent of the specified type for which the Court of Appeals found that administrative review is required, there is a plain violation of the guarantees of the Federal Constitution insuring (i) access to the courts, (ii) protection from deprivation of property by the State without due process of law and (iii) protection from the taking of property for public use without just compensation.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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80-807

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. _____

HERSCHEL BLUMBERG, *et al.*,

Petitioners,

v.

PRINCE GEORGE'S COUNTY, MARYLAND, *et al.*,

Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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APPENDIX

TABLE OF CONTENTS

	Page
Opinion of the Court of Appeals of Maryland, filed August 22, 1980	1
Opinion of the Court of Special Appeals of Maryland, filed November 7, 1979	47
Oral Opinion of the Circuit Court for Prince George's County, Maryland, rendered May 9, 1978	139
Oral Opinion of the Circuit Court for Prince George's County, Maryland, rendered January 4, 1979	199
Injunction, Declaration and Decree of the Circuit Court for Prince George's County, Maryland, filed January 30, 1979	233
Mandate of the Court of Appeals of Maryland, entered October 3, 1980	237
Motion for Reconsideration by Herschel Blumberg and Marvin Blumberg, filed in the Court of Appeals of Maryland on September 19, 1980	240
Order of Court of Appeals of Maryland denying Motion for Reconsideration by Herschel Blumberg and Marvin Blumberg, entered on September 26, 1980	293

Page

Order of Court of Special Appeals of Maryland, entered on October 3, 1980 . . . 294

Constitutional Provisions

First Amendment to the Constitution of the United States 296

Fifth Amendment to the Constitution of the United States 296

Fourteenth Amendment to the Constitution of the United States 296

Article 19 of the Declaration of Rights of Maryland . . 297

Statutes

Annotated Code of Maryland, 1957

Article 25A § 5(U) . . 297

Article 41 §§ 244-256 (1957, 1980 Cum. Supp.) . 298

Article 43, § 387C(d)3 (1980 Repl. Vol.) . . 311

Courts and Judicial Proceedings Article, § 3-409 (1980 Repl. Vol.) . . 311

Ordinances

Prince George's County Charter, 1970

Article X, Section 1013 . 312

Page

Prince George's County Code, 1972

Section 4-230 . . . 312

Section 4-242 (Sections 4-140 and 4-141 of 1975 Code) . 313

Amended Bill of Complaint for Injunctive and Declaratory Decree and Ancillary Damages, filed on October 5, 1976 . . 315

PRINCE GEORGE'S COUNTY, Maryland,
et al.

v.

Herschel BLUMBERG, et al.

No. 147.

Court of Appeals of Maryland.

August 22, 1980.

* * *

Alan E. D'Appolito, Associate County Atty. (Robert B. Ostrom, County Atty. and Michael O. Connaughton, Deputy County Atty., on the brief), for Prince George's County.

Paul T. Sisson, Associate Counsel, Hyattsville, for Washington Suburban Sanitary Commission.

Barbara A. Sears, Silver Spring (Joseph P. Blocher and Linowes and Blocher, Silver Spring, on the brief), for appellees.

Argued before MURPHY, C. J., and SMITH, DIGGES, ELDRIDGE, COLE, DAVIDSON and RODOWSKY, JJ.

DIGGES, Judge.

We granted certiorari in the present case to consider the multifarious issues generated by the revocation of respondents Marvin and Herschel Blumbergs' building and water-sewer permits by petitioners Prince George's County and the Washington Suburban Sanitary Commission (WSSC), respectively. Since we conclude, however, that the respondents failed to exhaust the available administrative remedies, we do not reach the merits of the case but reverse in part the judgment of the Court of Special Appeals, 44 Md. App. 79, 407 A.2d 1151, and directed that court to likewise reverse in part the judgment entered by the Circuit Court for Prince George's County.

The factual backdrop to this litigation is both extensive and complex, but, because of the view we take, may be somewhat condensed here. Respondents own approximately forty acres of ground in the Hyattsville area of Prince George's County on which they had planned to construct a high-rise residential building

consisting of two towers, twenty-seven and thirty-five stories high. Aware that their land was situated in an area of restricted sewer service, the Blumbergs began, in the summer of 1971, to make inquiries of the WSSC as to whether such service would be available for their project.[1] Assured that it was still available, the Blumbergs began preparing final plans for their building, and in April 1972 made a formal application to the WSSC for water and sewer service. The commission approved the application on October 25, 1972, and issued the permits on November 13 of that year.

Prior to receiving the necessary WSSC authorizations, respondents applied to Prince

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[1]The Blumbergs' property is situated in the Anacostia Drainage Basin, where, in 1970, the Secretary of the Maryland Department of Health and Mental Hygiene imposed a "sewer moratorium" which "bar[red] the granting of new authorizations after [May 20, 1970,] except with the approval of the State Department of Health and Mental Hygiene." The WSSC interpreted this moratorium order, however, to permit connections to the existing system if the commission determined there were "unusual circumstances."

George's County for a building permit, listing themselves as both owners and contractors of the proposed structure. Approval was granted by the county's Department of Licenses and Permits, which in January 1973 issued a building permit for the thirty-five story tower, in February issued a second permit for the twenty-seven story tower, and subsequently, consolidated the two permits into a third one on March 14, 1973. With all necessary authorizations in hand, the Blumbergs made their final preparations to begin construction; however, their problems were just beginning.

A few days before the actual construction commenced, respondents learned that the county was considering a revocation of their building permit because their application had failed to list a licensed builder as required by a re-

cently enacted county law.[2] This law became effective January 1, 1973, and established a licensing requirement for all building contractors within the county, see Prince George's County Code §§ 2-253.6 to 2-253.18 (1975).[3] In doing so, the ordinance specifically provided that a building permit "shall not be issued to any person except a duly licensed building contractor . . ." Id. § 2-253.15. Although the Blumbergs' building permit application had been filed prior to the new law's effective date, it was not approved and the permit issued until after that date. While respondents believed, as both builder and owner, that this

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[2]As Judge Wilner vividly points out in his opinion for the Court of Special Appeals, the underlying reason for the attempted revocation by the county was due to the mounting surrounding community opposition to the proposed height of the building. Prince George's Co. v. Blumberg, 44 Md. App. 79, 88-89, 407 A.2d 1151, 1159 (1979).

[3]For the reader's convenience, we shall cite to the most recent (1975) Prince George's County Code when discussing the provisions pertinent to this case, unless a change in the applicable law since 1972 is material.

law did not apply to them because of the manner in which the act defines "building contractor",[4] they nevertheless filed an application for a contractor's license on March 28, 1973, with the Department of Licenses and Permits. A temporary contractor's license was issued to the respondents on April 5, 1973, and a permanent one was delivered on April 17.

While their application for a contractor's license was pending, the Blumbergs on March 29 began construction of the building be-

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[4]Prince George's County Code § 2-253.6 (1975) defines "building contractor" as follows:

> Building Contractor. The term "building contractor" shall mean any person, firm, co-partnership, association, or a corporation, or other organization or combination thereof that for a fixed price, commission, fee or percentage accepts or offers to accept, orders or contracts for performing or superintending the building or construction of any building or structure that is designed to be used as a residence or dwelling, or who constructs for sale any new building or structure for occupancy as a residence or dwelling.

cause of a condition imposed by the WSSC when it issued the water and sewer permits requiring that the footings of the proposed building be completed and pass county inspection within six months of their issue date (here by May 10), otherwise the sewer and water permits would become void. The work continued until April 12, 1973, when the county's Chief Building Inspector, Mr. James R. Novak, issued a stop work order directing the respondents to cease further construction. In an accompanying letter, Mr. Novak explained that "[r]eview of [your building] permit reveals that it was illegally issued because the contractor listed on the permit application does not possess a valid residential Building Contractor's License . . . The permit is, therefore, null and void." Respondents, having already received their temporary contractor's license prior to the inspector's order, immediately notified the county of this fact, and asked that their building permit be revalidated and the stop

work order rescinded. Before the county could rectify its error, however, the Blumbergs' problem was compounded by actions of the WSSC. Upon being notified by the county (which was the normal practice) that the respondents' building permit had been withdrawn, the WSSC, on April 11, 1973, suspended the efficacy of its water and sewer permits. This, in turn, lead the county, on April 19, 1973, to notify the Blumbergs that until the WSSC's suspension was removed, the building permit could not legally be reissued.

The Blumbergs, perceiving the predicament which was developing, arranged a meeting with William W. Gullett, the then Prince George's County Executive, in an attempt to solve the problem. Mr. Gullett informed respondents that due to its height, considerable opposition to the building had developed in the residential neighborhoods surrounding the project; however, the county executive further indicated that if the Blumbergs would reduce the thirty-

five story tower to twenty-seven stories the building permit could be reissued. As a result of this meeting, respondents altered their plans and submitted to the county, on May 8, 1973, a revised application for a building permit, this time to construct twin twenty-seven story towers. The new application, as are all building applications, was routinely forwarded to the WSSC in order that it might review the project for sewer and water availability. The commission, having received a request from the Blumbergs for an extension of the six month time limit on their previously issued but now suspended water and sewer permits, as well as update information concerning sewage disposal conditions in the Anacostia Basin,[5] set for a

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[5]In January 1973, new sewage flow meters were installed at the WSSC's Anacostia Pumping Station at Bladensburg, Maryland. Flow figures for the period January 17-March 31, 1973, indicated that the pumping station overflowed 39 out of 74 days, and that a total of 20.6 million gallons of raw, untreated sewage was therefore discharged into the tidal portion of the Anacostia River. This was characterized in a February 1973 report by the Prince George's County Health Officer as a "serious health hazard."

hearing all matters then pending with regard to respondents' permits. In the meantime, the county delayed taking action on the revised application for a building permit.

On May 23, 1973, the hearing scheduled by the commission took place with the Blumbergs and other interested citizens present and represented by counsel. The commissioners heard argument from all desiring to be heard after receiving evidence concerning not only the prior commission action with regard to respondents' applications, but also the present availability of sewer service in the Anacostia Basin area. Following this hearing, the WSSC passed, on May 30, 1973, an order: (i) revoking the previously issued water and sewer permits because they had been granted in contravention of the commission's own rules, as well as on mistaken information; (ii) declaring that the outstanding permits, even if validly issued, had "expired . . . on May 10, 1973, because the County footings inspection for the

buildings to which the permits pertain had not been completed;" and (iii) denying the request for a new permit because of the inability, at that time, of the commission's sewage treatment system to handle the increase which the building would generate.

Following this series of events, the controversy entered the courts when the Blumbergs, on July 10, 1973, filed a bill of complaint in the Circuit Court for Prince George's County seeking injunctive and declaratory relief against Prince George's County, County Executive Gullett, and the WSSC. In essence, respondents requested that the court declare that the county's stop work order and WSSC's suspension of their permits was void and unenforceable, and that it enter an order "prohibiting the Defendants . . . from refusing to reissue Plaintiffs' building permit, . . . continuing the suspension of the sewer or water permits, or . . . otherwise interfering with the construction by Plaintiffs of the Plaza Towers

Apartments . . ." More than three years later, respondents amended their bill of complaint by joining Winfield M. Kelley, Jr., then County Executive, as an additional defendant, and requesting as a codicil to the previously sought relief, an award of $4.5 million in compensatory damages and $500,000 in punitive damages - the former representing the cost of delaying construction, and the latter "for Defendants' willful and deliberate misuse of government power." Two years later, the case finally went to trial (more than five years after it was initially instituted)[6] and the Circuit Court for Prince George's County (Bowen, J.) ordered, on January 30, 1979, that the county and WSSC

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[6]We note that while respondents initially requested that the "court hold a prompt hearing on the merits" of both the original and amended bill of complaints, they did little to bring about a speedy resolution of the dispute. In fact, the record indicates that on January 9, 1976, the clerk of the circuit court notified the Blumbergs that their action was to be dismissed under Maryland Rule 530 for lack of prosecution. However, Rule 530 was suspended at the request of respondents, and over the objection of petitioners, nine times by the Circuit Court for Prince George's County.

reissue the revoked permits; awarded $3,673,919 in compensatory damages against the county; dismissed the damage action against the WSSC on the ground of sovereign immunity; and sustained demurrers filed by the two former County Executives (Gullett and Kelley), dismissing them from the case. All parties, except Gullett and Kelley, appealed the trial court's decision to the Court of Special Appeals, which affirmed all aspects of Judge Bowen's order, except for his calculation as to the monetary amount due and his determination that the WSSC was entitled to claim immunity from responding in damages. Prince George's Co. v. Blumberg, 44 Md. App. 79 407 A.2d 1151 (1979). We granted certiorari.

Before this Court, the petitioners, as well as the respondents as cross-petitioners, raised numerous issues (nine in all) regarding the decision below, including, among others, whether Prince George's County and the WSSC have immunity from monetary liability for their

actions here, whether the claim of damages is barred by limitations or laches, whether the petitioners' revocations of the permits was lawful, whether an award of damages for the increased cost of capital due to delay in resolving this dispute is proper and whether the bill of complaint stated a cause of action against County Executives Gullett and Kelley in their individual rather than official capacities. However, the question which we find dispositive of the present case as it pertains to Prince George's County, and which renders it unnecessary that we examine any of the other issues presented concerning it is the contention of the county that the circuit court lacked jurisdiction over this action because of the Blumbergs' failure to exhaust the statutorily prescribed administrative remedy for its complained of action here. Since we determine that this impediment is equally applicable to the claim against the WSSC, we will direct dismissal of the action as it pertains to each of

these governmental entities. Further, since we agree with both the trial and intermediate appellate courts that no cause of action was stated against the two Prince George's County Executives, we will affirm the judgment entered in their favor.

An examination of the decisions of this Court over the last four or five decades will supply ample support for the statement that there are few legal tenets which have received greater acceptance into the juris-prudential law of this State than the one announcing:

> [A] claimant ordinarily must seek to redress the wrong of which he complains by using the statutory procedure the legislature has established for that kind of case, if it is adequate and available, and that if he is unsuccessful and wishes aid from the courts, he must take judicial appeals in the manner the legislature has specified rather than by seeking to invoke the ordinary general jurisdiction of the courts . . . [Consequently, we] have consistently held that where a special form of remedy is provided, the litigant must adopt that form and must not bypass the administrative body or official, by pursuing other remedies. [Agrarian, Inc. v. Zoning Inspector, 262 Md. 329, 332, 277 A.2d 591,

592 (1971).]

See in addition, e.g., Harbor Island Marina v. Calvert Co., 286 Md. 303, 308, 407 A.2d 738, 741 (1979); Klein v. Colonial Pipeline Company, 285 Md. 76, 83, 400 A.2d 768, 772 (1979); White v. Prince George's Co., 282 Md. 641, 649, 387 A.2d 260, 265 (1978); DuBois v. City of College Park, 280 Md. 525, 533, 375 A.2d 1098, 1104 (1977); Comm'n on Med. Discipline v. Bendler, 280 Md. 326, 330, 373 A.2d 1232, 1234 (1977); Comm'rs of Cambridge v. Henry, 263 Md. 370, 373-74, 283 A.2d 415, 417 (1971). The principle reasons for this exhaustion requirement with respect to administrative bodies are manifest - (i) the issues are largely within the expertise of the involved agency to hear the evidence and determine the propriety of the request; (ii) the courts would be undertaking functions the legislature thought could best be performed by an agency; and (iii) courts might be called upon to decide matters that would never arise if the prescribed administrative

remedy was followed. Gingell v. County Commissioners, 249 Md. 374, 376-77, 239 A.2d 903, 905 (1968). However, and as our decisions also make clear, there are exceptions to the administrative agency exhaustion rule that have been recognized. Among them are:

1. When the legislative body has indicated an intention that exhaustion of administrative remedies was not a precondition to the institution of normal judicial action. White v. Prince George's Co., 282 Md. 641, 649, 387 A.2d 260, 265 (1978).

2. When there is a direct attack, constitutional or otherwise, upon the power or authority (including whether it was validly enacted) of the legislative body to pass the legislation from which relief is sought, as contrasted with a constitutional or other type issue that goes to the application of a general statute to a

particular situation. Harbor Island Marina v. Calvert Co., 286 Md. 303, 308, 407 A.2d 738, 741 (1979).

3. When an agency requires a party to follow, in a manner and to a degree that is significant, an unauthorized procedure. Stark v. Board of Registration, 179 Md. 276, 284-285, 19 A.2d 716, 720 (1941).

4. Where the administrative agency cannot provide to any substantial degree a remedy. Poe v. Baltimore City, 241 Md. 303, 308-309, 216 A.2d 707, 709 (1966).

5. When the object of, as well as the issues presented by, a judicial proceeding only tangentially or incidentally concern matters which the administrative agency was legislatively created to solve, and do not, in any meaningful way, call for or involve applications of its exper-

tise. Md.-Nat'l Cap. P. & P. v. Wash. Nat'l Area, 282 Md. 588, 594-604, 386 A.2d 1216, 1222-27 (1978).

Of these, the Blumbergs only rely on the fourth as having any bearing on the case now before us, a contention which we discuss later.

In order to explain why we believe the Blumbergs had an administrative procedure available for substantially addressing their grievances against petitioners, which, as a prerequisite to judicial relief, they were obliged to follow, it is desirable that we outline the statutory schemes establishing this remedy. Turning first to the actions of the county, we begin by noting that Prince George's County, being a charter county established pursuant to Article XI-A of the Maryland Constitution, may exercise only those legislative powers expressly granted to such political subdivisions by the General Assembly. Md. Const., Art. XI-A, § 3; e.g., Ritchmount Partnership v. Board, 283 Md. 48, 56-57, 388 A.2d 523, 529-530

(1978); Mont. Citizens League v. Greenhalgh, 253 Md. 151, 158, 252 A.2d 242, 245 (1969). One such power specifically delegated to charter counties by the legislature in the Express Powers Act, Md. Code (1957, 1973 Repl. Vol., 1979 Cum. Supp.), Art. 25A, § 5, is the authority:

> [t]o enact local laws . . . establish[ing] a county board of appeals whose members shall be appointed by the county council; . . . and for the decision by the board on petition by any interested person and after notice and opportunity for hearing . . ., of such of the following matters arising (either originally or on review of the action of an administrative officer or agency) under any law, ordinance, or regulation of . . . the county council, as shall be specified from time to time . . .: the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit . . . or other form of permission or of any adjudicatory order . . . [Id. § 5(U) (emphasis added).]

If a county establishes a board of appeals in conformance with this section, then "any person aggrieved by the decision of the board . . . may appeal to the circuit court for the county" to seek review of this decision, and the cir-

cuit court's action is reviewable by appeal to the Court of Special Appeals. Id. Moreover, the General Assembly has directed that "[t]he review proceedings provided by this subsection shall be exclusive." Id. (emphasis added).

Pursuant to this authorization, Prince George's County created, by ordinance, a Board of Appeals "to hear and determine all administrative appeals allowed by ordinance or law," with the exception of three matters not here relevant. Prince George's County Code §§ 2-117; 2-118 (1975). More particularly, county law provides:

> The owner or occupant of a building or structure or any directly aggrieved person may appeal to the Board of Appeals from a final decision of the Building Official refusing to grant a modification of the provisions of the Basic Code or of

> this Ordinance.[7] Application for appeal may be made when it is claimed that: The true intent of the Basic Code or of this Ordinance has been incorrectly interpreted or applied. Notice of such appeal shall be in writing and filed within thirty (30) days after the decision is rendered by the Building Official. [Id. § 4-140 (emphasis added).]

Furthermore, the Board of Appeals, in reviewing decisions of the Building Official, is given by the "Ordinance" wide-ranging authority:

> The Board of Appeals . . . may vary the application of any provision of the Basic Code or Ordinance to any particular case when, in its opinion, the enforcement thereof would do manifest injustice, and/or would be contrary to the spirit and purpose of the provisions herein or the public interest, or when, in its opinion, the interpretation of the Building Official should be modified

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[7]The term "Building Official" refers to the Chief Building Inspector of the Department of Licenses and Permits. Prince George's County Code § 4-103(1) (1975). The reference to the "Basic Code" is to the Basic Building Code published by the Building Officials and Code Administrators International (BOCA) which was adopted as the building code of the county, id. § 4-101; while "this Ordinance" is in reference to subtitle 4 of the county code (and includes as codified all sections whose numbering begins with "4-") entitled "Building", which consists mainly of amendments to the Basic Code.

or reversed. [Id. § 4-141 (emphasis added).]

Primarily raised in the present case is the question of whether the actions of the county here -- declaring the building permit void, issuing a stop work order and refusing to grant a new permit (or reissue an amended old one) providing for towers of fewer stories -- are to any extent reviewable under this statutory framework, and if so, whether the review procedures outlined above were required to be followed. The county contends that its actions in this case are reviewable by the Board of Appeals because they were based on an interpretation and application of the county building code (including the BOCA Basic Code), and accordingly, under Md. Code (1957, 1973 Repl. Vol., 1979 Cum. Supp.), Art. 25A, § 5(U), this appeal procedure was the exclusive remedy. Specifically, Prince George's County points to the fact that the Blumbergs' complaint is that the Chief Building Inspector (Mr. Novak) had no authority to revoke or refuse to reissue the

building permit; that the relief sought, aside from damages, is the obtaining of an order directing the reissuance of the permit; and that Mr. Novak acted in the belief that because the Blumbergs had failed to comply with the contractor's license law, and because the WSSC had suspended and then revoked the water and sewer permits, issuance of a building permit was prohibited by section 4-230 of the Prince George's County Code.[8] Thus in the county's view, the Blumbergs' complaint was clearly within the Board of Appeals jurisdiction, since its actions were based on an interpretation and application of the Basic Code and the building subtitle of the county code. Consequently, they argue the legal and factual issues in-

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[8]Section 4-230 of the Prince George's County Code (1972) provides in relevant part: "A building permit shall not be issued under the provisions of the Basic Code and of this Subtitle [(the building code)] unless and until there has been full compliance with the applicable requirements contained therein, and with all statutes, ordinances and regulations containing provisions related to and essential to the safety, health, sanitation and welfare of the occupants or future occupants . . ."

volved were ones which the Board was designed to resolve. The respondents, on the other hand, assert that the Board's review authority is limited to refusals by the Building Official "to grant a modification of the provisions of the Basic Code or of this Ordinance." Prince George's County Code § 4-140 (1975). So, in their view, since what is at issue is not a modification of the building code, but rather a determination that the building permit was void for the alleged failure to comply with applicable county law, as well as whether the county's actions constituted an unlawful interference with a vested property right,

there was no administrative remedy to exhaust.[9] Moreover, even if the Board does have jurisdic- respondents contend that the failure to exhaust this administrative remedy is excused (i) because it would be inadequate and (ii) because of the allegation that there existed a tortious conspiracy to harm them.

The circuit court, as well as the Court of Special Appeals, rejected the county's argument. The trial court ruled that there was no administrative remedy to exhaust because the Board of Appeals was without power to decide the validity of a building permit or to order

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[9]Respondents also contend that Prince George's County has failed to preserve for appellate review its exhaustion argument because it did not raise the issue by written motion in the trial court as required by Md. Rules 321 and 323. However, since a claim of failure to exhaust administrative remedies is, as our prior decisions make plain, jurisdictional in nature it may be raised at any time, even on appeal. See Sec., Dep't of Human Res. v. Wilson, 286 Md. 639, 645, 409 A.2d 713, 717 (1979); Comm'n on Med. Discipline v. Bendler, 280 Md. 326, 327, 373 A.2d 1232, 1232 (1977); Md. Rule 885. In any event, it is clear from the record that the trial court did address and decide this question.

the Building Official to change his position with regard to the law. Additionally, that court believed that the Blumbergs were entitled by by-pass the Board since they alleged the existence of a conspiracy, sought damages, and because "pursuit of this matter in the administrative area would have been totally fruitless." The Court of Special Appeals affirmed the trial judge's resolution of this issue, although on slightly different grounds. While recognizing that the respondents could have appealed the April 12 determination of Mr. Novak that the permit was "null and void" for failure to obtain a contractor's license, the intermediate appellate court believed that there existed no need for respondents to do so, since the letter annulling the permit indicated that it would be reissued as soon as proof of licensure was established. Prince George's Co. v. Blumberg, 44 Md. App. 79, 97-98, 407 A.2d 1151, 1164 (1979). Further, the intermediate appellant court concluded the action of Mr.

Novak did not amount to a "final decision of the Building Official refusing to grant a modification for the provisions of the Basic Code or of [Subtitle 4]" because the revocation of the permit had nothing to do with the county building code and "based upon the testimony of Novak and Gullett, it was clearly not Novak's decision, but that of Gullett." Id. at 98-99, 407 A.2d at 1164. Finally, the Court of Special Appeals determined that since the county Board of Appeals lacked the authority to order the WSSC to reinstate its water and sewer permits, "an administrative appeal was essentially worthless." Id. at 98, 407 A.2d at 1164. We disagree.

Turning first to the issue of whether an administrative remedy existed with regard to the county's actions, we begin by noting that section 4-140 of the Prince George's County Code, providing for appeals to the Board of Appeals, does not limit the jurisdiction of the Board, as suggested by respondents (and held by

the intermediate appellate court), to reviewing only those decisions by the Building Official refusing to grant modifications in the building code. Rather, as the second sentence of section 4-140 makes clear, "[a]pplication for appeal may be made when it is claimed that the true intent of the Basic Code or of this Ordinance has been incorrectly interpreted or applied." (Emphasis added). It seems to us that this language permits appeals by an aggrieved party from all decisions of the Building Official made under the county building code, including his actions with regard to

building permits.[10] Throughout this dispute, the Blumbergs have asserted that they have complied with all applicable county laws, that their building permit was thus valid, and that it was illegally revoked. These were clearly claims that the "intent of the Basic Code or of this Ordinance has been incorrectly inter-

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[10]In this regard we note that if the right of appeal was as narrow as that suggested by respondents, it would have been unnecessary for Prince George's County to amend as they did the suggested appeal provision contained in the BOCA Basic Code which provides:

> The owner of a building or structure or any other person may appeal from a decision of the building official refusing to grant a modification of the provisions of the Basic Code covering the manner of construction or materials to be used in the erection, alteration or repair of a building or structure to the board of appeals. Application for appeal may be made when it is claimed that: the true intent of the Basic Code . . . have been incorrectly interpreted, the provisions of the Basic Code do not fully apply, or an equally good or better form of construction can be used. [BOCA Basic Code § 127.1 (5th ed. 1970).]

We further note that section 4-141 of the Prince George's County Code (establishing the powers of the Board of Appeals) does not have a counterpart in the BOCA Basic Code.

preted or applied," since the Basic Code, as amended by the county, addresses the issuance, suspension and revocation of building permits, as well as when stop work orders, as those here, may be issued. See BOCA Basic Code §§ 114.0-.9; 123.0-.2 (5th ed. 1970); Prince George's County Code §§ 4-112, -113; 4-275.7 (1975); Prince George's County Code § 4-230 (1972). Thus, the Blumbergs could have sought review by the Board of Appeals of Mr. Novak's April 12 decision declaring the permit "null and void" for failure to comply with the building contractor's licensing law; likewise they could have asked the Board to review his supplemental decision of April 19, as well as the Building Officials' refusal to reinstate the building permit once the matters mentioned by Mr. Novak in his letters had been resolved. If respondents were still not satisfied, judicial review of the Board's decision by way of appeal was available.

Nor do we agree with the Court of Special Appeals' characterization of these letters as not being final decisions of the Building Official. In the first place, we fail to see how the determination by Mr. Novak that the building permit was "null and void", accompanied by a stop work edict, could indicate anything other than finality. While both letters did mention that if the Blumbergs corrected the alleged violations of the law, the permit, upon resubmission of the application, would be reissued, that did not mean that the ruling, without the required change, was any less final, particularly since here the Blumbergs believed that there was no basis for the position taken by Mr. Novak. Moreover, even if this wasn't a final decision, the failure of Mr. Novak to reissue the permit upon compliance by respondents with the licensure law certainly was. At the same time, the mere fact that the decision by Mr. Novak was influenced or dictated by the County Executive did not make it

any less the decision of the Building Official as far as the Blumbergs were concerned. The letters, as well as the stop work order, were signed by Mr. Novak, and thus were decisions by the Building Official for purposes of an administrative appeal. Accordingly, we hold that, with regard to the actions of Prince George's County, the respondents did have an available administrative remedy which they failed to utilize.

Anticipating the conclusion reached here -- that an administrative remedy exists for reviewing the actions of Prince George's County -- the Blumbergs next contend that they are excused from exhausting this remedy because the present case falls within one of the exceptions (the fourth) to the exhaustion doctrine already mentioned in this opinion. Specifically, the respondents maintain that an appeal to the County Board of Appeals would not have provided them with an adequate remedy for the grievances alleged because of the inability of the Board

to grant relief vis-a-vis the WSSC. In addition, they assert that the Board could not determine whether the actions of the county and the WSSC constituted an unconstitutional taking of private property, nor whether a conspiracy to harm the Blumbergs existed.

While we agree that the county Board of Appeals has no jurisdiction to review the WSSC's actions, see Board of Appeals v. Marina Apts., 272 Md. 691, 699, 326 A.2d 734, 738 (1974), this does not make the appeal to the Board inadequate, or excuse its use, as it concerns the determinations made by the county official. Because of the Board's authority to "vary the application of any provision" of the Prince George's County building code when "injustice" would result, enforcement "would be contrary to . . . the public interest" or "in its opinion, the interpretation of the Building Official should be modified," it could have directed that the Building Official issue a permit to the Blumbergs (assuming it had been pro-

perly revoked, a question which also would have been before them) notwithstanding the collateral actions by the WSSC concerning the water and sewer permits. Merely because a builder, such as the Blumbergs, needs the approval of a number of independent agencies in order to construct a building, does not mean that when two or more of these agencies take actions which the applicant believes are wrong the individual can claim that any one administrative remedy is inadequate. An administrative remedy "is not 'inadequate' so as to authorize judicial intervention before exhaustion of the remedy merely because it is attended with delay, expense, annoyance, or even some hardship." Bennett v. School Dist. of City of Royal Oak, 10 Mich. App. 265, 159 N.W.2d 245, 247 (1968). Thus, the fact that the Blumbergs would have to utilize whatever review procedures established by the WSSC (described shortly) in order to challenge its decisions does not relieve them of the obligation to follow the exclusive review

procedures of Prince George's County with respect to the Building Official's actions.[11] Accordingly, we hold that there is an adequate administrative remedy which the Blumbergs could, and should, have utilized in addressing their grievance against the county; moreover, this is the procedure which the General Assembly has specifically denominated to be the exclusive available remedy. Md. Code (1957, 1973 Repl. Vol., 1979 Cum. Supp.), Art. 25A, § 5(U).

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[11] While not applicable to the present case, we note that in 1975 the General Assembly established "Consolidated Permit Procedures," Md. Code (1957, 1975 Repl. Vol., 1979 Cum. Supp.), Art. 78A, §§ 56-67, for the purpose of "coordinat[ing] administrative decision making by . . . consolidating application procedures to assist those persons who must obtain permits from one or more local and State agencies" before undertaking development and construction projects. Id. § 56(c). These procedures provide for joint hearings and fact-finding, coordinated by the Board of Public Works, in connection with permit applications, id. § 59; however, "[a]dministrative and judicial review of the final action of a local government or State agency on an application for a permit shall be in accordance with the law and procedures governing the issuance of permits by the particular local government or State agency." Id. § 65.

We find, likewise, little merit in the other arguments raised by respondents in support of their position that exhaustion was not required. This Court has held on many occasions, when faced with a claim of an agency's unconstitutional taking of property, that such issues must still go through the administrative process, particularly when judicial review is provided. See, e.g., Arnold v. Prince George's Co., 270 Md. 285, 311 A.2d 223 (1973) (change in zoning as unconstitutional taking); Gingell v. County Commissioners, 249 Md. 374, 239 A.2d 903 (1968) (same); Poe v. Baltimore City, 241 Ind. 303, 216 A.2d 707 (1966) (same); Bogley v. Barber, 194 Md. 632, 72 A.2d 17 (1950) (vested property right in zoning). And we can see no distinction between those cases and the present one. As to their claim that a conspiracy between the county through its chief administrative officer, the County Executive, and the commission excuses the need to exhaust the administrative process (without deciding whether

such can in other circumstances eliminate the exhaustion requirement), we answer by pointing out that here there is no evidence in the record to implicate the county Board of Appeals (whose membership is, under the Express Powers Act, Md. Code (1957, 1973 Repl. Vol., 1979 Cum. Supp.), Art. 25A, § 5(U), named by the county council) in the alleged conspiracy or to indicate that the Board would be unable to perform its statutorily prescribed quasi-judicial function impartially.

Having determined that the Blumbergs failed to exhaust their administrative remedy with respect to the actions by Prince George's County, we next examine the suspension and revocation of respondents' water and sewer permits by petitioner WSSC. Although not raised by the agency, we find that the respondents' suit against it is also barred for the failure of the Blumbergs to utilize the administrative remedy provided for the redress of WSSC actions. Accordingly, we will direct that this

suit against the WSSC likewise be dismissed. See Sec., Dept. of Human Res. v. Wilson, 286 Md. 639, 643-645, 409 A.2d 713, 716-17 (1979) (being jurisdictional, court may raise failure to exhaust administrative remedies on own motion).

The Washington Suburban Sanitary Commission, as a body corporate organized under the laws of the State of Maryland, is, as this Court recently held, an agency of the State, even though it operates principally in Prince George's and Montgomery Counties. Katz v. Washington Sub. San. Comm'n, 284 Md. 503, 509-512, 397 A.2d 1027, 1031-1032 (1979). As a State agency, its procedures are governed by the Administrative Procedures Act (APA), Md. Code (1957, 1978 Repl. Vol., 1979 Cum. Supp.), Art. 41, §§ 244-256A, which provides specifically for the manner in which the actions of agencies subject to the Act's provisions may be reviewed. The APA's review section id. § 255, provides that "[a]ny party aggrieved by a final

decision in a contested case . . . is entitled to judicial review . . ." in the circuit court or the Baltimore City Court as the case may be. Once an agency has reached a "final decision", (i.e., all steps of the agencies internal review procedures have been utilized, see Leatherbury v. Gaylord Fuel Corp., 276 Md. 367, 373-374, 347 A.2d 826, 830-831 (1975)) "in a contested case" then section 255's provisions take effect and must be followed, for as we stated earlier: "if [a person] is unsuccessful [before an agency] and wishes aid from the courts, he must take judicial appeals in the manner the legislature has specified rather than by seeking to invoke the ordinary general jurisdiction of the courts." Agrarian, Inc. v. Zoning Inspector, 262 Md. 329, 277 A.2d 591, 592 (1971). Thus, if the action of the WSSC in suspending and later revoking the water and sewer permits of the Blumbergs was a "final decision in a contested case", then respondents must have appealed that decision to the Circuit

Court for Prince George's County, and the failure to do so precludes review by way of an independent court suit.

Assuming for purposes of the present case that the decision by the full Commission was "final" and that no other administrative review was required, we must then determine if the WSSC's action was in a "contested case." If it was, then court review must be by way of appeal; if not, then an independent court suit, such as that here, may be proper. See State Dep't of A. & Tax. v. Clark, 281 Md. 385, 399-400, 380 A.2d 28, 36-37 (1977). A "contested case" is defined in the APA as "a proceeding before an agency in which the legal rights, duties, statutory entitlements, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." Ordinarily, unless otherwise required by statute, "the necessity of a hearing in an administrative proceeding depends on the character of the proceeding and the nature of

the interest of the person seeking relief." Eliason v. State Roads Comm., 231 Md. 257, 260, 189 A.2d 649, 651, cert. denied, 375 U.S. 914, 84 S.Ct. 211, 11 L.Ed.2d 152 (1963). "[W]here a public administrative body acts in a judicial or quasi-judicial matter, and its acts are particular and immediate rather than general and prospective, the person whose rights or property may be affected by the action is entitled to notice and hearing." Albert v. Pub. Serv. Commission, 209 Md. 27, 37-38, 120 A.2d 346, 350-351 (1956). See Murray v. Dep't of Soc. Services, 260 Md. 323, 326-27, 272 A.2d 16, 18 (1971); Mandel v. Bd. of County Comm'rs, 238 Md. 208, 216, 208 A.2d 710, 715 (1965). In the present case, there are no statutory provisions requiring the WSSC to hold hearings on the refusal to issue or revoke water and sewer permits; nor were there, at the time of the agency's actions here, any rules or regulations

by the WSSC providing for a hearing right.[12] In fact, the commission did in this case provide respondents with a hearing before revoking the permits. We hold that the judicial review provisions of the APA were applicable, see Murray v. Dep't of Soc. Services, supra, and since the Blumbergs did not appeal the commission's decision, they failed to exhaust their administrative remedies. Accordingly, the circuit court should have dismissed the present action against that State agency.

The final matter which we address in the present case is the contention raised by the Blumbergs in their cross-petition that the bill of complaint, as amended, did state a cause of action against former county executives

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[12]Effective March 3, 1979, the WSSC adopted regulations providing, as a matter of right, for an adjudicatory hearing before a "hearing officer" whenever an individual's "legal rights, duties, or privileges are adversely affected by a decision of the Commission." 6 Md. Register 463 (1979). The regulations also provide for review of the hearing officer's decision by appeal to the full commission.

Gullett and Kelley, that it was therefore error to dismiss them from the suit and the trial court, in so dismissing these officials, abused its discretion in not granting the Blumbergs leave to amend their complaint. We have carefully read both the original and amended bills and find that we agree with Judge Wilner's assessment of them for the Court of Special Appeals as they pertain to these defendants. With respect to Gullett, "the only specific complaint against [him] that smacks of an excess of authority was that he refused to reissue the [building] permit", Prince George's Co. v. Blumberg, supra, 44 Md. App. at 103, 407 A.2d at 1167; and as to Kelley that court noted that "[e]xcept to name him as the then current County Executive, the amended bill made no allegations whatsoever against Kelley." Id. Consequently, the circuit court was not in error when it dismissed the suit against Gullett and Kelley. Moreover, we do not find, as required by our prior decisions, a clear

showing of an abuse of discretion on the part of the trial court in refusing to allow the Blumbergs a third opportunity in which to state a cause of action against the former executives. See, e.g., Crowe v. Houseworth, 272 Md. 481, 489, 325 A.2d 592, 597 (1974); Perlmutter v. Minskoff, 196 Md. 99, 112, 75 A.2d 129, 135 (1950). Two voluminous bills of complaint have already been filed in this case, and we have not been convinced by any proffer on the part of the Blumbergs that a third one would alleviate the defect in the other two. Accordingly, we affirm the dismissal of Kelley and Gullett from the case.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AS IT PERTAINS TO PRINCE GEORGE'S COUNTY AND THE WASHINGTON SUBURBAN SANITARY COMMISSION REVERSED AND CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REVERSE THE JUDGMENT ENTERED IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AGAINST THOSE TWO DEFENDANTS WITHOUT A NEW TRIAL. JUDGMENT OF THE COURT OF SPECIAL AP-

PEALS AS TO WILLIAM W. GULLETT AND WINFIELD M. KELLEY, JR., AFFIRMED. COSTS TO BE PAID BY MARVIN AND HERSCHEL BLUMBERG.

PRINCE GEORGE'S COUNTY,
Maryland et al.

v.

Herschel BLUMBERG et al.

No. 152.

Court of Special Appeals of Maryland.

Nov. 7, 1979.

* * *

Alan E. D'Appolito, Associate County Atty., Robert B. Ostrom, County Atty. and Michael O. Connaughton, Deputy County Atty., on brief, for appellant, Prince George's County.

Paul T. Sisson, Hyattsville, for appellant, Washington Suburban Sanitary Commission.

Joseph P. Blocher and Barbara A. Sears, Silver Spring, with whom were Linowes and Blocher, Silver Spring, on brief, for appellees.

Argued before GILBERT, C. J., and MORTON and WILNER, JJ.

WILNER, Judge.

This is a case of government running amok. The facts are long and complicated (the printed record extract is nearly 1,500 pages); but what happened, in a nutshell, is that Prince George's County and the Washington Suburban Sanitary Commission (WSSC), after careful study and review, each issued appropriate permits allowing Herschel and Marvin Blumberg to construct a twenty-million dollar high-rise apartment complex, and, after the Blumbergs had commenced construction pursuant to and in reliance on those permits, those agencies revoked the permits and have refused to reissue them.

In an action by the Blumbergs against the county, WSSC, and two former County Executives, the Circuit Court for Prince George's County (1) directed the county and WSSC to reissue the permits, (2) awarded a judgment for substantial damages against the county, (3) dismissed the action for damages against WSSC on the ground of its sovereign immunity, and (4) sustained demurrers filed by the two former County Execu-

tives (Gullett and Kelley), dismissing them from the case. No one, except Gullett and Kelley, was entirely satisfied with this result. The county has appealed both the directive to reissue the building permit and the judgment for damages; WSSC has appealed the order requiring the reissuance of its water and sewer permits; and the Blumbergs have cross-appealed the court's refusal to grant monetary relief against WSSC and the dismissal of their action against Gullett and Kelley. We shall here affirm all actions of the circuit court save two; we believe that the court erred (1) in its calculation of damages against the county and (2) in determining that WSSC is entitled to sovereign immunity. We shall therefore remand those aspects of the case for further proceedings in accordance with this Opinion.

The land in question consists of about 40 acres located on Belcrest Road in the Hyattsville area of Prince George's County. The

Blumbergs had planned to develop the property since at least 1961, but because of one thing or another - interest rates, tight money - the project did not begin to move forward in earnest until 1971. On July 16, 1971, through counsel, they wrote to WSSC, recounting some of the history of the project, advising of their intention to start construction of a 600-unit high-rise apartment building, and requesting a determination that "the present situation will permit sewer service" for the project. As was pointed out in the letter, the project would not have required any new or extended sewer lines. There was a line already running across the property, and what the Blumbergs needed was permission to connect into it.

This request was referred to the Commissions' Legal Department. On October 6, 1971, Paul J. Hefferon, Staff Counsel to WSSC, responded that, in the Commission's opinion, because the connection would be into an existing line, "a connection of the proposed apartment

building would be permitted under the existing letter order of the State Department of Health dated May 20, 1970."[1] Upon receipt of this letter, Marvin Blumberg went to see Mr. Hefferon. He "asked him exactly what it [the letter] meant, whether I would get sewer and water, does it mean what I think it says it means, and he said, yes, it means you are going to get sewer and water."

With this assurance, the Blumbergs engaged an architect and began preparing final plans for their building. On April 6, 1972, they formally applied to WSSC for sewer and water service, paying, at that time, the fees set by WSSC of $8,925.

At about this time, WSSC became concerned whether, in light of delays in the expansion of the Blue Plains Treatment Plant, the State-

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[1]The reference here is to the "sewer moratorium" established by the State Secretary of Health and Mental Hygiene. The undisputed import of this letter is that because the connection was to an existing line and did not require any new lines, it was not barred by the Secretary's directive.

imposed moratorium was sufficient to protect water quality in the metropolitan Washington area. On June 21, 1972, the Commission, by Resolution No. 72-053, decided to impose certain additional restrictions of its own on sewer hookups in a number of the basins in the area, including the Anacostia basin in which the Blumberg project was located. One effect of this Resolution was to subject the Blumberg application to approval by the Commission itself, rather than by the staff. Perhaps in furtherance of this action, on July 27, 1972, John F. Stabely, the head of the WSSC Permits and Records Section, advised the Blumbergs that Mr. Hefferon's letter of October 6, 1971, "should not be construed as a commitment by the Commission to provide service. Because of limitation in system capacity no commitment for service can be made."

Faced with this apparent retrenchment on the part of the Commission, the Blumbergs pressed their case for hook-up approval. On

August 24, they wrote to James A. Stapp, WSSC Director of Engineering and Construction, complaining about the implications of the July letter and pointing out their reliance on previous assurances given by various Commission personnel. They also enlisted the aid of then-County Executive William W. Gullett (a cross-appellee here) and then-County Councilwoman Gladys N. Spellman, both of whom wrote to the Commission endorsing the project.

On August 23, 1972, the Commission adopted Resolution No. 73-066, the second in a series of four dealing with sewer connections. This Resolution, made effective as of August 2, 1972, suspended all applications for sewer connections of the type represented by the Blumberg project (more than 10 dwelling units). There were several exceptions to this suspension, of which two are, or will soon become, relevant here. The first of these was contained in ¶2(b) of the Resolution: "situations where, on a premise of availability of water

and sewer service, a . . . building permit . . . has been issued on or before August 2, 1972 by the [county] or where a WSSC connection application . . . has been approved or issued by the WSSC on or before August 2, 1972." The second relevant exception was set forth in ¶3(c). This allowed the Commission to suspend or waive the provisions of the Resolution for good cause shown, provided that it first determine the existence of good cause before considering the merits of the application.

Notwithstanding this Resolution, the Blumberg application was placed on the Commission's agenda for its October 4 and October 11 meetings as Item No. 465. In connection therewith, Mr. Stapp, the Director of Engineering, submitted to each Commissioner a packet of material concerning the project, with a covering memorandum dated September 21, 1972. Among other things, this memorandum points out that the plumbing applications "are pending" and that "Mr. Blumberg wants assurance that his

permits will be processed to completion." (Emphasis supplied.) Testimony from Mr. Stapp and then-Commission Chairman David Elliott established that packets of this type were normally sent to the Commissioners a week or so in advance of the meeting and were brought by them to the meeting.

The Blumberg application was not acted upon at either the October 4 or October 11 meeting, but was deferred until October 25, in order to allow the staff to consider the effect of other pending applications as well on the overall capacity of the water and sewer system. The Commission did, however, at its October 4 meeting, adopt a third Resolution (No. 73-075), amending and making more restrictive the ¶2(b) exception contained in the August Resolution. Under the new Resolution, this exemption would be applicable only where (1) a building permit was issued prior to August 2 premised on a statement of water and sewer service availability supplied by WSSC prior to that date, or (2)

approval of a connection application by WSSC on or before August 2. By WSSC approval, the Resolution meant "the acceptance and notation on the pertinent application of payment of the requisite fees", this definition intending to differentiate "between the mere tendering of an application and the WSSC staff action of acceptance and approval thereof, since the fees paid notation is not placed on the application until after such approving review occurs. . . ."

While waiting for WSSC to act upon its connection application, the Blumbergs, on October 6, 1972, applied to Prince George's County for a building permit. The application listed the Blumbergs as both owners and contractors, and described the project as phase 2 of a 36-story condominium apartment building.

October 25 was the magic day for the Blumbergs, for on that day, WSSC approved their connection application and directed the staff to process and issue the necessary water and sewer permits. The circumstances under which

that decision was made will be discussed later. Suffice it at this point to note only that the Commission's action was confirmed by letter of its Chairman dated October 27, informing the Blumbergs that their request "has been reviewed and approved for water and sewer service to 600 units apartment project. . . ." The letter continued that the authorization was subject to the installation of appropriate water saving devices, that the Commission's Plumbing Division and Permits and Records Section would be advised of the Commission's action "and authorized to process pending application and/or permits to completion", and that the "connection application and/or hookup plumbing permit" would terminate if construction did not go forward within six months of issuance of the permit. By "construction gone forward", the letter said, was meant inspection of the footings by the county.

The actual permits were issued on November 13, 1972. They reflected what the evidence

otherwise showed was proposed: two towers, one 36 stories containing 288 units, one 35 stores containing 280 units, or a total of 568 units. In anticipation of receiving the permits (No. 381236 for one tower, No. 381287 for the other), the Blumbergs, on November 10, 1972, paid an additional $8,410 in WSSC fees for attaching plumbing fixtures, these fees being apart from the connection authorization fee and not necessarily being due at that time.

The next series of events concerns Prince George's County and the building permit. On October 17, 1972 - 11 days after the Blumbergs filed their application - the County Council adopted and sent to the County Executive Council Bill 72-1972. This bill, signed by County Executive Gullett on November 1, and taking effect January 1, 1973, provided for the licensure of building contractors. A building contactor was defined as a person who "for a fixed price, commission, fee or percentage accepts or offers to accept, orders or contracts

for performing or superintending the building or construction of any building or structure . . . designed to be used as a residence or dwelling, or who constructs for sale any new building or structure for occupancy as a residence or dwelling." Any person furnishing character references, evidence of financial responsibility, training and experience, and law-abiding nature, and a $25 fee was entitled to a license. No examination was required. However, the bill provided that, with an exception not relevant here, a building permit for a residence or dwelling "shall not be issued to any person except a duly licensed building contractor or his duly authorized agents." See current Prince George's County Code (1975), § 2-253.15 (then codified as § 2-72). The bill did not declare any such permit inappropriately issued to be invalid: indeed, the only sanction in the bill was a criminal penalty for doing business as a contractor without a license. See 1975 Code, § 2.253.18.

Because they were acting as their own builder, and thus neither constructing the building for a price or fee, or necessarily for the purpose of selling the structure, the Blumbergs apparently believed that they did not fall within the definition of "building contractor", and were therefore not required to be licensed. Accordingly, they made no application for such a license.

On January 25, 1973 - more than three weeks after this bill took effect - the County issued a building permit to the Blumbergs, notwithstanding that, as of then, they had not sought or been granted a contractor's license pursuant to the new law. The permit (No. 1597-72-CG) authorized construction of Phase I of a 35-story condominium apartment building. The Blumbergs paid a permit fee of $6,199. A month later - on February 23, 1973 - a second permit was issued (No. 1598-72-CG), upon payment of an additional $4,960, authorizing Phase II of the

project - a 27-story apartment tower.[2] On March 13, 1973, upon an amended application, a third permit was issued, this one combining the earlier two permits into one and describing the project as "Phase I - 35 Story Condominium Apt. Bldg. Phase II - 27 Story Condominium Apt. Bldg." Each of the three permits was based upon an application clearly showing the contractor to be the Blumbergs; and yet no question was ever raised about their not being licensed. It should be noted that the same county agency - the Department of Licenses and Permits - was responsible for issuing both building permits and contractor's licenses.

By March 28, 1973, Marvin Blumberg had been made aware of the possible need to obtain a contractor's license, for on that day he paid his $25 and made application for himself and his brother Herschel. A temporary 60-day license was duly issued to the Blumbergs on April

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[2]The project was to consist of two towers - one 35 stories and one 27 stories - both to be part of one building.

5, 1973, followed by an annual license on April 17, 1973.[3] In the meanwhile, on March 29, 1973, the Blumbergs broke ground and started construction. The first work done was the foundation - a concrete slab three feet thick requiring some 10,000 cubic yards of concrete. The first section footings were poured on March 30, and, according to Marvin Blumberg, work proceeded apace, with more concrete being poured on almost a daily basis. The county building inspector was at the site continuously.

It was on April 12, 1973, that the raw, naked power of government descended upon the Blumbergs. The story, as the record reveals it, is this.

Notwithstanding all of the investigations, reviews, and approvals leading up to the issuance of the various permits (including zon-

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[3]Temporary licenses were issued because of delays in implementing the necessary administrative procedures for the issuance of the annual licenses called for by the ordinance.

ing and site plan approval by the appropriate local agencies), notwithstanding even that County Executive Gullett himself had earlier endorsed the project in a written letter to WSSC,[4] because some citizens in the vicinity of the project thought that the building woud be too high and made their feelings forcefully known to Mr. Gullett, Mr. Gullett decided that the project should not proceed as then authorized. He therefore decided to stop the construction by recalling the building permit. When called to testify, Mr. Gullett's memory about the events that ensued (and his role in causing those events to occur) was unfortunately quite vague, but it is clear beyond doubt that, bowing to community pressure, Gullett ordered that the county building permit

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[4]Mr. Gullett denied that his letter constituted an endorsement. We fail to see what other purpose the letter could have, however. It was written at the behest of the Blumbergs to WSSC at a time when some question existed as to whether the water and sewer permits would be issued.

be lifted, and that he issued that order solely because of community opposition to the height of the building, and for no other reason.[5]

Mr. Gullett apparently recognized that a building permit could not be lawfully revoked solely on the basis of political pressure, especially when construction had already commenced. Some excuse had to be found. From among those eagerly supplied by opponents of the project, Gullett picked what he thought was the fact that the Blumbergs were not licensed as contractors, as required by law, and that, under then County Code § 2-72, a building permit should not have been issued. Unaware that the Blumbergs had, in fact, obtained their li-

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[5]Gullett confirmed his deposition testimony that he directed the head of the county department of licenses and permits, a gentleman named Gershenow, to revoke the permits, and that he did this in response to pressure from community activists. On May 7, 1973, he wrote a letter to the Mayor of University Park, in which he stated: "As you may know by now, I did rescind the building permit for the 36 story building and have informed the builder that they [sic] could not build higher than a 20 story building."

cense - obviously making no real attempt to find out - Mr. Gershenow, the Director of Licenses and Permits, under instructions from Gullett and bolstered by a supporting opinion of the county law department, determined that the permit was void and directed his subordinate, James Novak (Chief Building Inspector), to revoke it.[6]

Thus it was that on April 12, 1973, Mr. Novak wrote a letter to the Blumbergs advising that:

(1) "Review of the subject permit reveals that it was illegally issued because the contractor listed on the permit application does not possess a valid residential Building Contractor's License . . ." (Emphasis supplied.)

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[6]As Mr. Gullett was quick to point out, there were four or five other permits that were also revoked for the same reason. Blumbergs' is the only one of these that the county has refused to reissue, however. In their haste to revoke the permit, the county officials apparently did not consider whether the Blumbergs were even required to be licensed.

(2) "The permit is, therefore, null and void. A stop work notice has been posted on the job site and work cannot commence until a valid building permit is obtained."

(3) An application for a license can be obtained from the County Service Building.

(4) "At such time as your contractor obtains the required license, the owner or his authorized agent as evidence [sic] by appropriate affidavit, may visit the Permits Office in the County Service Building to amend the permit application to list a properly licensed contractor. Previous agency approvals such as Park and Planning and WSSC will remain valid provided there is no change in law or regulations in the interim period. Following your amendment to the permit application to satisfy the legal requirements, the permit will be validated and a new issue date inserted. There will be no additional fee for the reissue." (Emphasis supplied.)

Having made the decision to lift the per-

mit, the county tarried not in enforcing the Gullett edict. Novak's letter was hand delivered to Blumberg at the jobsite the day it was written. That same day - April 12 - the county building inspector slapped two violation notices on the job. The job was very effectively and very quickly shut down,[7] and it remained so despite the fact that Blumberg immediately notified the county that he and his brother were, in fact, licensed.

We return now to WSSC, which had also been made aware of some organized opposition to the project, primarily because of the proposed height of the building. The Commission heard from these groups on April 4 and April 8. Chairman Elliott stated that on April 11, 1973, he received a call from one of Gullett's aides,

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[7]Mr. Novak testified that summary revocation as opposed to simply allowing an owner or contractor a reasonable time to correct a deficiency, was used only in cases of misrepresentation. He conceded, however, that there was no misrepesentation here, and that he acted upon the instructions of Mr. Gershenow and the advice of the county law department that the permit was null and void.

Jay Morris, who advised him that "a decision had been made in the County Executive's Office" to recall four or five permits that did not conform to county regulations "and that we should follow suit." Elliott interpreted this call as an instruction to take similar action, and expressed the belief that the Commission had a duty to follow that request if it was legal.[8] He and the Commission apparently thought the request was legal, for that same day, April 11, without notice to the Blumbergs, much less a hearing, the Commission adopted an Order reciting, in relevant part:

> "The Commission having before it, this 11th day of April 1973, matters presented in connection with the water and sewer permits . . . issued on November 10, 1972, to [the Blumbergs] and the Commission being advised, by oral report, that the Prince George's County Executive is this date ordering the vacation or withdrawal of the building permit

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[8] Mr. Elliott, one of the three members of the Commission from Prince George's County, was appointed to it by the County Executive with the approval of the County Council. See Maryland Manual, 1973-74.

for the construction with respect to which the water and sewer permits pertain, together with the advice that the County Executive proposes to recirculate the building permit proposal to pertinent agencies, including this Commission before the building permit might be reissued or reinstated, and the Commission being advised in the premise, it is, this 11th day of April 1973,

"ORDERED, that the efficacy of the permits issued by the Washington Suburban Sanitary Commission on November 10, 1972, with respect to water and sewer service for the proposed Plaza Towers project be, and the same is hereby suspended until further action of this Commission; and it is

"FURTHER ORDERED, that the questions heretofore raised with respect to the issuance of the permits on November 10, 1972, together with all matters pertinent to Commission consideration of requests for water and sewer permits, including (but not limited thereto by reason of such specificity) information as to sewage flow calculations and projections at the time of such further action, shall be considered at the time of the further review indicated by the County Executive's action and by the Commission's within order. . . ." (Emphasis supplied.)

Following the adoption of this Order, a copy of which was not mailed to the Blumbergs until April 13, Elliott left a message for Mr.

Morris that the Commission "had acted upon the County Executive's Office request."

It is evident at a glance that the advice given to the Commission of Gullett's intentions, as recited in its Order, is wholly inconsistent with that conveyed to the Blumbergs in Mr. Novak's letter. Under the Novak letter, all the Blumbergs had to do to regain the building permit was to show that they were, in fact, licensed.

The county resolved this inconsistency, to Blumbergs' detriment, on April 19 (two days after it issued the annual contractor's license). Mr. Novak sent a "follow-up" to his earlier letter, stating, in part:

> "On April 13, 1973, the Washington Suburban Sanitary Commission ordered that the efficacy of the permits issued by WSSC with respect to water and sewer service is suspended until a Petition for Writ of Mandamus and an Injunction indicating that compliance with the FAA regulations has not been achieved.
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> "Therefore, these two (2) additional items of concern must be resolved for legal reissuance of the

building permits to take place."[9]

What was afoot here was not lost upon the Blumbergs. Following receipt of Novak's letters, Mavin Blumberg went to see Mr. Gullett. According to Blumberg's uncontradicted testimony, Gullett made clear that the problem was the height of the building. Blumberg offered to revise the project either to reduce the height of the two towers to 27 stories, or to build three towers of 20 stories each. Gullett, according to Blumberg, agreed to the first alternative, whereupon the

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[9]This letter is, of course, remarkably incoherent. The WSSC action referred to was apparently that taken on April 11, 1973; the record reveals no further or other action by WSSC on April 13, except to mail a copy of the April 11 Order to the Blumbergs. The suspension ordered by WSSC said nothing about a Petition for Mandamus, and Injunction, or FAA (Federal Aviation Administration) regulations. Testimony supplied by Novak indicated that, in the frantic search for reasons to stop this project, someone suggested that FAA approval was needed for a building of this height. Except for a cursory review of the zoning ordinance, neither Novak nor anyone else bothered to determine whether, in fact, such approval was necessary and, if necessary, could be obtained. The reference to mandamus and injunction remains a mystery to the Court.

Blumbergs started work on revising the plans to reduce the height of the larger tower,[10] obtained approval of the revision by the Maryland-National Capital Park and Planning Commission, and thereafter, on May 8, 1973, filed an application for a revised building permit.

The charade continued, however, as the Blumbergs were spun around once more. When the county declined to process the revised application, the Blumbergs contacted Gullett again. This time, they were told that WSSC was holding it up "and he couldn't do anything about it." So they went back to WSSC, which conducted what it termed a hearing and what the Blumbergs called "a great show" on May 23. On May 30, 1973, it issued another Order (which it declined for some unexplained reason to release until June 4, 1973), in which the Commission (1) claimed that it didn't know what it was

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[10] It will be recalled that the second building permit, which became part of the third, already called for one 27-story tower.

doing on October 25, 1972, when it adopted Resolution 73-080 and also authorized the Blumberg permits,[11] (2) treated the revised application for building permit as a new proceeding, notwithstanding that the same 600 units (or less) were involved, and thus considered the earlier permits to be "moot", and (3) decided that "capabilty problems in [the] Anacostia Basin system" and delays in the expansion of the Blue Plains Treatment Plant "militate against and preclude a finding at this time, on the basis of the material adduced upon the record on May 23, 1973, that Sewer service is available". Accordingly, in its operative sections, the Order withdrew the earlier permits and ordered a notation placed on the

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[11]The actual language was that "the written record of the Commission's meeting of that date is not clear", and that the language of Resolution 73-080 "does not fully comport with the said authorizing instructions, and, moreover, created an inadvertent discrepancy between the authorizing instructions intended to be covered by that Resolution and earlier Commission resolutions concerning sewer service limitations in the Anacostia Drainage Basin."

county building permit application, "Sewer and Water service availability not present at this time."

The Kafkaesque drama was now complete. Under § 4-230 of the County Code, that determination precluded reissuance of the building permit. Building upon an erroneous, and clearly spurious, assumption that the Blumbergs were not licensed as contractors, the county and the Commission, in tandem, managed to revoke building, water, and sewer permits (without even offering to refund the substantial fees paid for them) and thus leave the Blumbergs with an enormous construction project in which they had invested a great deal of time and money, and could not complete. On July 10, 1973, they filed suit for injunctive and declaratory relief.

With this background, we turn now to the legal issues before us, beginning with those raised by Prince George's County.

(1) Was The Circuit Court Without Jurisdiction Because The Blumbergs Failed To Exhaust A Statutorily Prescribed Administrative Remedy?

The question here is whether, as a prerequisite to judicial review, the Blumbergs were obliged to present their grievance against the county to the County Board of Administrative Appeals.

Through Md. Annot. Code art. 25A, § 5(U) - part of the "Express Powers Act" - the General Assembly has authorized charter counties, by local law, to provide for the establishment of a county board of appeals. Section 5(U) further authorizes the county to provide,

> "for the decision by the board on petition by any interested person and after notice and opportunity for hearing and on the basis of the record before the board, of such of the following matters arising (either originally or on review of the action of an administrative officer or agency) under any law, ordinance, or regulation of, or subject to amendment or repeal by, the county council . . . [:] the issuance, renewal, denial, revocation, suspension, annulment, or modification of any . . .

permit . . ."

The statute goes on to permit judicial review of the board's decision, and concludes with the statement: "The review proceedings provided by this subsection shall be exclusive."

Pursuant to this authorization, Prince George's County, by ordinance, created a Board of Administrative Appeals and authorized it to "hear and determine all administrative appeals allowed by ordinance or law" with exceptions not relevant here. See 1972 County Code, § 2-117. More particularly, § 4-242 of the County Code provided that:

> "The owner or occupant of a building or structure or any directly aggrieved person may appeal to the Board of Administrative Appeals from a decision of the Building Official refusing to grant a modification of the provisions of the Basic Code or

of this Subtitle.[12] Application for appeal may be made when it is claimed that the true intent of the Basic Code or of this Subtitle has been incorrectly interpreted or applied." (Emphasis supplied.)

Section 4-242 further authorized the Board to "vary the application of any provision of the Basic Code or this Subtitle to any particular case when, in its opinion, the enforcement thereof would do manifest injustice, and/or would be contrary to the spirit and purpose of the provisions herein or the public interest, or when, in its opinion the interpretation of the Building Official shall be modi-

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[12]The Prince George's County Building Code is set forth in subtitle 4 of the County Code. It consists primarily of the Basic Building Code published by the Building Officials and Code Administrators International (BOCA) - referred to as the "Basic Code" - and the amendments made to the Basic Code by the county council. Except for a short provision adopting the Basic Code by reference, subtitle 4 consists mostly of the specific amendments to that code, one of which is § 4-242, which added a new § 128 to the Basic Code. The term "Building Official" was defined to mean the Chief Building Inspector of the Department of Licenses and Permits (current County Code, § 4-103) - i.e., Mr. Novak.

fied or reversed."

The county's argument is this: (1) the Blumbergs are complaining that Mr. Novak had no authority to revoke the building permit, and no right to refuse to reissue it; (2) the relief sought, aside from damages, is an order directing Novak, or his successor, to reissue the permit; (3) Novak acted in the belief that because the Blumbergs had failed to comply with the contractor's license law, and because WSSC had suspended and later revoked the water and sewer permits, a building permit was barred by § 4-230 of the County Code;[13] (4) his decision and action was therefore based upon an inter-

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[13]Section 4-230 provided in relevant part: "A building permit shall not be issued under the provisions of the Basic Code and of this Subtitle unless an until there has been full compliance with the applicable requirements contained therein, and with all statutes, ordinances and regulations containing provisions related to and essential to the safety, health, sanitation and welfare of the occupants or future occupants of any building, structure or premises. . . ." (Emphasis supplied.) The section says nothing about revoking or suspending a permit already issued.

pretation and application of the Basic Code, as amended; and (5) there is a special, and therefore exclusive, remedy for testing that decision and action, and seeking relief from it - namely, a petition to the Board of Administrative Appeals under § 4-242.

There is a rule, of course, well established in the law, that a litigant must exhaust his available administrative remedies before applying for judicial relief; equally well established, however, are some exceptions to the rule. In State Dep't of A. & Tax. v. Clark, 281 Md. 385, 403, 380 A.2d 28, 39 (1977), the Court of Appeals put it this way:

> "We have indicated . . . that when an administrative remedy is provided by statute, relief provided under those statutory provisions must be exhausted before a litigant may resort to the courts. That is, such a remedy is exclusive, and the administrative body must not be by-passed by pursuing other remedies. . . . However, '[t]here are few absolutes in the law, and the rule that an administrative remedy must be exhausted before recourse is had to the courts is not one of them.' " (Citations omitted.)

See also Poe v. Baltimore City, 241 Md. 303, 216 A.2d 707 (1966).

Since it does not appear from the record extract that the county raised the exhaustion question in any of its pre-trial pleadings, we shall have to judge whether the doctrine, or an exception to it, applies based upon the evidentiary record made in the lower court, rather than upon just the allegations in the bill of complaint and amended bill of complaint.[14]

The doctrine that requires a complainant to exhaust his admininistrative remedies before invoking the aid of a court traditionally rests upon two bases: one is pragmatic, the other more fundamental. From a pragmatic point of view, administrative agencies are given the first opportunity to resolve a dispute (that is

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[14]As no one has raised the issue either below or in this Court, we shall not comment on whether the exhaustion argument should have been raised by written motion, either preliminarily under Maryland Rule 323 upon the premise that it went to the Blumbergs' capacity to sue, or otherwise upon the premise that it was a jurisdictional defense. See Maryland Rule 321 dealing with motions.

within their jurisdiction) because (1) they are presumed to have an expertise in the matter not possessed by courts, and (2) if given an opportunity to exercise that expertise, they may obviate all or part of the need for a judicial resolution. The more fundamental reason is simply that when a legislative body validly provides a special means of resolving certain disputes, it is incumbent upon the courts to follow the law and to respect and enforce that procedure. All of this, however, is subject to the underlying premise that an adequate administrative remedy does, in fact, exist; for, if there is no such remedy available, there is nothing to exhaust and neither purpose for the doctrine would be served.

It is in this context and in light of the further requirement in § 4-242 of the County Code that a notice of appeal to the Board must be filed within 30 days "after the decision is rendered by the Building Official" that we judge the county's argument.

The first grievance afforded the Blumbergs was Mr. Novak's letter of April 12, 1973, declaring the building permit null and void because of a failure to have a contractor's license. That determination could have been appealed to the Board; but, since the letter made clear that the permit would be reissued as soon as proof of licensure was established, there was no need to file such an appeal. The Blumbergs, in fact, were licensed; and, based upon the letter, once they exhibited their license to Novak the permit would be reissued and that would be the end of the matter. Why waste a $100 filing fee for an unnecessary appeal?

The letter of April 19 presented a more serious dilemma. Here, Novak, on orders from his supervisor Gershenow, in turn on orders from the County Executive (at whose pleasure he served - see Prince George's County Charter, Art. IV, § 402, Art. V, §§ 501, 504, 407), indicated that the permit would not be issued

until the "efficacy" of the WSSC permits was restored, certain court proceedings were resolved, and compliance with unspecified FAA regulations was assured. Here was a "Catch-22" masterpiece. WSSC had suspended the efficacy of its permits solely at Gullett's request and because the county had lifted the building permit; no other reason was given or suggested in the Commission's April 11 order or in Chairman Elliott's testimony. Now, the county was delaying (not denying, only delaying) reissuance of the building permit until the WSSC reinstated its water and sewer permits. What appeal lay from that?

The county concedes that the Board of Appeals had no authority whatever to require WSSC to reinstate the efficacy of its water and sewer permits. See Board of Appeals v. Marina Apts., 272 Md. 691, 326 A.2d 734 (1974). That impotence alone made an administrative appeal essentially worthless, especially in light of the Commission's subsequent Order of May 30,

1973; even if the Board were able to direct, and did in fact direct, Novak to reissue the building permit, the Blumbergs would have been virtually in the same helpless position.

It seems highly questionable, moreover, whether the Board had statutory jurisdiction even to entertain an appeal. All that Novak said in his April 19 letter was that the WSSC permits and two other "items of concern" would have to be resolved before reissuance of the building permit. Especially in light of Gullett's assurances that if the height of the building was reduced the permit would be re-issued, however, this was not a "final decision of the Building Official refusing to grant a modification of the provisions of the Basic Code or of [Subtitle 4]", which is the only

basis for an administrative appeal under § 4-242.[15] For one thing, from the letter itself, it was not a final decision by anyone. Secondly, based upon the testimony of Novak and Gullett, it was clearly not Novak's decision, but that of Gullett. And it had nothing whatever to do with modifying the provisions of the county building code.

It seems clear, therefore, that resort to the Board of Appeals would have been entirely fruitless. Section 4-242 says nothing about appeals from a patently political decision of the County Executive. We conclude, therefore, that the circuit court did have, and did pro-

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[15] It would appear that § 4-242 is the only operative provision dealing with appeals to the Board with respect to building permits. Art. 25A, § 5(U) of the State Code is merely an authorization for the county to create and provide for the jurisdiction of the board; it does not, itself, create such a board or vest jurisdiction in it. The local law that implemented § 5(U) and actually created the Board (§ 2-117) merely allowed it to hear administrative appeals "allowed by ordinance or law". Section 4-242 is the only such ordinance or law to which our attention has been directed.

perly exercise, jurisdiction. There was no adequate administrative remedy to be exhausted.

(2) Did Prince George's County Commit An Unlawful Act To the Injury Of Appellees In This Case?

The county here contends that its revocation of the building permit was lawful, and that it should not be held responsible for anything improper that may have been done by WSSC. We shall examine these interesting arguments.

In support of its first claim, it says: (1) CB 77-1972 provided that a residential building permit "shall not be issued to any person except a duly licensed building contractor", (2) when the permits in question were issued, the Blumbergs were not so licensed, (3) such permits were therefore void ab initio and conferred no rights whatever on the Blumbergs, and (4) consequently, the county's action of April 12, 1973, was perfectly legal.

The Court of Appeals, it is true, has stated on a number of occasions that a municipal authority is not estopped from asserting the invalidity of a building permit that was erroneously and unlawfully issued - that such a permit confers no rights upon its holder. See, for example, Lipsitz v. Parr, 164 Md. 222, 164 A. 743 (1933); Berwyn Heights v. Rogers, 228 Md. 271, 179 A.2d 712 (1962); Kent County v. Abel, 246 Md. 395, 228 A.2d 247 (1967); and cf. City of Hagerstown v. Long Meadow, 264 Md. 481, 287 A.2d 242 (1972). Those cases, however, and others reaching similar conclusions, involved not merely a defect in the issuance of the permit, but rather a situation in which the project authorized by the permit was itself illegal. In each case, the proposed structure was prohibited by the applicable zoning ordinance. The illegality was not in the permit or the manner of its issuance, but rather in what it purported to authorize; and that illegality was a continuing one.

Such is not the case here, of course. Not only was there no defect in the project, but by April 12, 1973, there was nothing illegal about the permit either. Whatever violation had existed when the permit was first issued had already been cured. The "void ab initio" theory has no relevance at all to this case.

The county, ever resourceful, seeks to dismiss the annoying fact that the alleged violation had already been cured and that the Blumbergs were in fact in compliance with the law when their permit was suspended by asserting, as though it had some significance, that the Blumbergs had neglected to amend their application to reflect their subsequent licensure. This disingenuous non sequitur fails to account for the fact that nowhere in either the licensure law or the building code is there any requirement that such information be reported on an application for a building permit (much less that an application validly filed prior to enactment of the new law had to be retro-

actively amended).[16] The simple fact is that the county law defines very carefully the limited grounds for suspending or revoking a permit, and none of those grounds authorized, or were relied upon in, the April 12 suspension.[17]

We turn then to the question of whether the lifting of the building permit became lawful because of the intervening action of WSSC. Ordinarily, there would be a semblance of merit to this aspect of the county's argument: absence or valid withdrawal of the WSSC water and sewer permits might, under § 4-230 of the

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[16]Section 113.2 of the BOCA Basic Code provides that an application for a permit "shall be submitted in such form as the building official may prescribe. . . ." (Emphasis supplied.) We do not construe this provision as authorizing a suspension or revocation of a permit because an application did not contain that which was not prescribed when the application was first submitted.

[17]Section 114.2 of the Basic Code authorizes suspension for failure to commence and pursue the work; § 114.6 authorizes revocation for misrepresentation in the application or the plans upon which the permit was based; and an amendment to § 114.6 authorizes revocation for failure to locate utility lines.

County Code, justify the non-issuance, or even the suspension, of a building permit. But where, as here, the evidence established that the action of WSSC on April 11 - the only action that was relied upon in the county's letter of April 19 - had been orchestrated by the County Executive and was based solely upon the fact that the county had (wrongfully) suspended the building permit and had itself requested WSSC to take comparable action, the county will not be heard to lay the blame on WSSC and thereby justify an action that was otherwise wholly unjustifiable. Quite apart from the shared culpability of WSSC, an issue we shall discuss later in this Opinion, the county cannot hide behind actions of WSSC that it, the county, deliberately set in motion.[18]

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[18] In final desperation, the county seeks to escape responsibility for the wrongful acts of Mr. Gullett by asserting that they were ultra vires and should not bind the county. It overlooks, however, the complicity of Messrs. Gershenow and Novak and the supporting role of the County Law Department. This was not a "one man show."

The answer to the county's second question, therefore, is "yes"; it did commit an unlawful act to the injury of appellees.[19]

(3) Governmental Immunity

The county here asserts that even if, arguendo, revocation of the building permit was wrongful - even if based, as it says, "on an erroneous interpretation of County law or political motivation", nevertheless, because the culpable county officials acted in a discretionary governmental capacity the county is not answerable in damages for their wrongful acts. They seek support for this conclusion from Carey v. Baltimore County, 262 Md. 491, 278

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[19]The county contends that the Blumbergs did not proceed in good faith and did not perform enough work in reliance of the permit to obtain a vested interest. The evidence, however, is quite to the contrary. In addition to all of the planning, design and site preparation work, a substantial amount of concrete had been poured by April 12. This was clearly more than "window dressing". Compare Pemberton v. Montgomery County, 275 Md. 363, 340 A.2d 240 (1975), and Ross v. Montgomery County, 252 Md. 497, 250 A.2d 635 (1969).

A.2d 6 (1971), and Bradshaw v. Prince George's County, 284 Md. 294, 396 A.2d 255 (1979).

We start with the proposition that, except for the doctrine of governmental immunity, a county is in the same position as anyone else whose wrongful acts cause damage to another person. Its only shield is the immunity it possesses as a governmental entity.

In 1970, Prince George's County adopted a charter form of government. Included in its first charter, which became effective in February, 1971, was § 1013, which provided as follows:

> "Governmental Liability. The County may be sued in actions sounding in tort in the same manner and to the same extent that any private person may be sued. The County shall carry liability insurance with adequate limits to compensate for injury to persons or damage to property resulting from negligence and other wrongdoings of its officers, agents, and employees. Nothing herein shall preclude the County from meeting the requirements of this section by a funded self-insurance program."

In Bradshaw v. Prince George's County, supra, the Court of Appeals held this provision

to be a valid and effective waiver of the county's governmental immunity, not only with respect to its own corporate acts, but also for the "actionable tortious conduct" of its officers "for which liability can be imputed to the County." 284 Md. at 302, 296 A.2d at 260. The Court went on, then, to discuss the circumstances under which such vicarious liability might exist. Bradshaw involved the actions (or non-action) of police officers, whom the Court concluded were in the status of "public officials". Public officials, said the court, have a qualified immunity of their own, which is independent from that of the county, and rests upon a different basis. They are "protected by a qualified immunity against civil liability for non-malicious acts performed within the scope of [their] authority." Id. at 303, 396 A.2d at 260, 261. The key ingredients of this immunity are (1) the absence of malice, and (2) acting within the scope of authority. Public officials, in other words, have no liability

for mere negligence.

The "bottom line" of Bradshaw is that there can be no vicarious liability on the part of the county unless there is primary liability on the part of the public officials whose conduct created the injury. Indeed, the actual decision in Bradshaw affirming summary judgments in favor of the county and the individual officers was based on the fact that the plaintiff had not alleged either malice or an abuse of authority on the part of the officers.

This case proceeded upon an amended bill of complaint, filed in October, 1976, in which the Blumbergs sued not only the county and WSSC, but Gullett and Kelley as well. No other officials or employees of the county or WSSC were sued. As to Gullett, it was alleged that (1) he was the County Executive, (2) in that capacity he had "direct control" over the Department of Licenses and Permits and thus over the processing and issuing of building permits, (3) neither he nor any other official had

authority to revoke a building permit except for fraud or misrepresentation (Basic Code, § 114.6), (4) although the Blumbergs complied with the April 12 directive, Gullett and the county refused to reissue the permit, and (5) a revised application for a 27-story structure was filed "upon representation by the Defendant Gullett that a building permit would be issued if the height of the 35-story building were reduced accordingly."

That constitutes the sum and substance of the pleaded allegations against Gullett, and indeed against any of the individual county officials.[20] There was no direct allegation of malice on the part of anyone, and, as noted, the only specific complaint against Gullett that smacks of an excess of authority was that he refused to reissue the permit.

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[20]Except to name him as the then current County Executive, the amended bill made no allegations whatever against Kelley. Novak was mentioned as merely the author of the April 12 letter.

A full year after the amended complaint was filed, Gullett and Kelley filed a demurrer in which they asserted that they were not proper parties to the action, that they acted lawfully "in refusing to issue" building permits, and a number of special defenses not relevant here. They did not interpose their immunity or suggest that a cause of action had not been alleged (except to the extent of their claim that they were not "proper parties" to the action). After a hearing, the court sustained their demurrer on the grounds that (1) the plaintiffs "have lost nothing of consequence" and (2) there were no allegations that would entitle the Blumbergs to a judgment against them separate and apart from any judgment they might obtain against the county. The court stated further that because of its doubt that the Blumbergs "can amend to state a cause of action against these two men individually or would even want to do so if the Court gave them permission to do so", the demurrer would be and

was sustained without leave to amend.

The Blumbergs have challenged the correctness of this ruling in their cross-appeal, but because it is germane to the issue raised by the county, we shall consider it here. They assert that the amended complaint did state cause of action against Gullett and Kelley, and that, in concluding that it did not, the court erred both in substance and by relying on a ground not raised in the demurrer. It is true that the demurrer, and the court's expressed reason for sustaining it could (and should) have been more precise; but there is no doubt that the ruling was correct. The amended bill simply did not state a cause of action against Gullett or Kelley (or any other county official), and they were therefore properly dismissed. With respect to the preclusion of further amendment, the printed record does not reveal that the Blumbergs ever asked for leave to amend or objected to the court's denial of such leave. Accordingly, even if that aspect of the

ruling would have amounted to an abuse of discretion under the principles recounted in Hertelendy v. Montgomery Cty., 245 Md. 554, 566, 226 A.2d 672 (1967), the issue has not been preserved for appellate review.

From this, it might be argued that, as no cause of action lay against Gullett or any other county official, there could be no vicarious liability against the county. Indeed, this would seem to flow quite naturally from what the Court said in Bradshaw.

But things are never so easy. For whatever reason, the county never raised in the lower court the issue of its governmental immunity. It not only filed no pre-trial pleading asserting such a defense, but, at the conclusion of trial on the issue of liability, its counsel acknowledged that it was not interposing that defense. Under Maryland Rule 323 b, of course, a motion raising governmental immunity may be filed at any time, including on appeal; and, although it does not appear that

the county has ever raised the defense by motion, as seemingly required by Rule 323, we shall nevertheless consider the argument.[21] In doing so, however, we shall, in terms of the county's liability, look not solely at what was alleged in the amended bill as we would be obliged to do had the defense been raised prior

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[21]There is a seeming conflict with respect to Rule 323b that should be pointed out and resolved. Prior to April, 1976, the Rule purported to require the defense of governmental immunity to be raised preliminarily; however, in Bd. of Education v. Alcrymat Corp., 258 Md. 508, 266 A.2d 349 (1970), the Court held that, because the defense was one that could not be waived except pursuant to legislative enactment, it could be raised at any time, including on appeal, notwithstanding the Rule. The Court thereupon conformed the Rule to its decision by permitting the defense to be raised "at any time." In doing so, however, it may have omitted consideration of Maryland Rule 1 a, which plainly states that the Chapter 300 Rules (including Rule 323) do not apply to appellate proceedings. Nonetheless, and without mentioning Rule 1 a, the Court in Board v. John K. Ruff, Inc., 278 Md. 580 (1976), and particularly in footnote 2 at page 583, 366 A.2d 360, made clear that the phrase "at any time", as used in Rule 323 b was intended to include, and did indeed include an appellate proceeding. Although the law is clear by reason of the Ruff decision, the Court may wish to consider the apparent conflict between that decision and Rule 1 a.

to trial, but at what was shown at trial. We know of no other way to fairly mesh Maryland Rules 323 b and 1085. If we are to consider the defense initially on appeal, in fairness to appellees and to the trial court, we must do so on the basis of the entire record before us.

The question, then, is whether the circuit court found that any county public officials acted maliciously or in excess of their authority and, if so, whether there was sufficient evidence to support that finding. If so, the prerequisite for vicarious liability is present.

In announcing its findings and decision as to liability, the court never used the word "malice"; but it is clear that that is precisely what the court found. In describing the impetus for lifting the permit, the court said:

> "And just as positively as I am sitting in this chair, if I had been standing beside him and watched him do it, Mr. Gullett took into assessment how many votes were involved in this project, and since dollars don't vote and people do, the Blumbergs lost out.

> "Mr. Gullett suddenly was going to stop that program, notwithstanding his previous endorsement, and notwithstanding the fact that he thinks it's great for Prince George's County, that it's just what the County needs, that it's going to save the County from the vise (sic) of garden apartments, and exactly what the tax base needs and everything else. No. If there is any way to stop it, we are now going to stop it."

The court then characterized the reason picked by Gullett and his county solicitor as "part of a flimsy legal excuse for taking action which wasn't based on that reason at all, but on an entirely different reason which was an improper one. . . ." Continuing, the court discussed Gullett's role in persuading WSSC to take consistent action, noting: "We don't think that government ought to act with such a demonstrated lack of integrity, and we think that the principle of law that a person has the vested right in a permit such as this was designed to protect the citizen who does everything that he is supposed to do from the arbitrary and capricious whims of political

winds in the area."

There is no doubt that this added up to a finding of malice; nor is there any doubt that the evidence supported such a finding.

Malice is one of those concepts that can be defined in many ways. There are 77 pages in Words and Phrases devoted just to that one word. It means one thing in the law of defamation, another thing in the context of authorizing punitive damages, and something else again in general tort and criminal law. In Cumberland Glass Mnf'g C. v. DeWitt, 120 Md. 381, 392, 87 A. 927, 931 (1913), the Court of Appeals held that, in terms of malicious interference with contractual relations, malice "does not mean actual malice, or ill will, but consists in the intentional doing of a wrongful act without legal justification or excuse." See also McCarter v. Chamber of Commerce, 126 Md. 131, 136, 94 A. 541 (1915); Stannard v. McCool, 198 Md. 609, 84 A.2d 862 (1951). The court later applied the same definition to

malice in a criminal context. See Chisley v. State, 202 Md. 87, 105, 95 A.2d 577 (1953); Rosenberg v. State, 164 Md. 473, 165 A. 306 (1933). Indeed, except in those special types of cases where some more restrictive element is required, this seems to be the most common definition applied in tort cases - where civil liability is based upon malicious conduct. See, for example, Bliss v. Southern Pac. Co., 212 Or. 634, 321 P.2d 324 (1958); O'Brien v. Howell, 92 So.2d 608 (Fla. 1957); Smith v. Moran, 43 Ill. App.2d 373, 193 N.E.2d 466 (1963); Weqiel v. Hogan, 28 N.J. Super. 144, 100 A.2d 349 (1953); Jones v. Citizens Bank of Clovis, 58 N.M. 48, 265 P.2d 366 (1954); Hedman v. Siegriest, 127 Vt. 291, 248 A.2d 685 (1968); Childress v. Abeles, 240 N.C. 667, 84 S.E.2d 176 (1954); Davis v. Nash Central Motors, 332 S.W.2d 475 (Mo. App. 1960); Beardsley v. Soper, 184 App. Div. 399, 171 N.Y.S. 1043 (1918); Jones v. Hebdo, 88 W.Va. 386, 106 S.E. 898 (1921). See also 26 Words

and Phrases 220-225.

We see no reason to depart from that standard in judging the liability of a public official. If such a person intentionally does something that he knows is wrong, that he has no legal justification to do, and that causes injury to another person, he is and ought to be answerable in damages.

Applying that standard here, we are, of course, aware that the issuance and revocation of permits, like many other governmental acts, involves the exercise of governmental discretion to which tort liability does not ordinarily attach. See, for example, Carey v. Baltimore County, 262 Md. 491, 278 A.2d 6 (1971). Mere errors of judgment, whether occasioned by negligence or otherwise, are not actionable. But when that act, ordinarily discretionary and therefore protected, is done knowingly and deliberately, for an improper motive, and without legal justification, it becomes more than an error in judgment. It becomes malicious.

There is no question that Gullett orchestrated what occurred, that he had no authority whatever to do it, that he did it for wholly improper reasons, and that he did it deliberately, knowing full well the consequences of his actions. The evidence fully supports the court's conclusions that he acted arbitrarily, capriciously, with a lack of integrity, and for improper motives. The prerequisite to the county's liability under § 1013 of its charter was therefore satisfied, notwithstanding that Gullett, personally, was properly dismissed on demurrer.

(4) Suspension of Maryland Rule 530

The county complains that the court improperly suspended the operation of Maryland Rule 530 at a time when there had been no proceedings of record for some 23 months. A decision to suspend, or not suspend, operation of the Rule is discretionary with the trial court, and, absent a clear abuse of that discretion,

its decision will not be disturbed on appeal. Langrall, Muir & Noppinger v. Gladding, 282 Md. 397, 384 A.2d 737 (1978). We find no such abuse in this case. Much of the delay was occasioned by the laudable, but fruitless, efforts of the Blumbergs to settle the case.

(5) Claims With respect to Damages

The county asserts that the Blumbergs are barred from collecting money damages by reason of (1) the statute of limitations, (2) laches, and (3) their failure to give notice to the county as required by Md. Annot. Code, art. 57, § 18. In addition, it claims that, if entitled to damages at all, they are limited to $250,000, and that the court erred in its calculation of the amount of damages.

The limitations and laches argument is based on the fact that the Blumbergs' original bill of complaint, filed in July, 1973, asked only for injunctive relief requiring the county to reissue the building permit, and made no

claim for monetary damages. The damage claim first appeared in the amended complaint filed in October, 1976, more than three years after the cause of action - the wrongful revocation - arose.

The original complaint, in 39 paragraphs, alleged the basic history of what had occurred, averred that the Blumbergs had acquired vested rights in the respective permits, and asserted that their suspension or revocation amounted to a denial of due process and equal protection. In paragraphs 38 and 39, the Blumbergs complained that they were incurring "on-going costs", that subcontracts amounting to nearly $284,000 were being jeopardized, and that because of the delays additional construction costs and loss of income from the project would be sustained. They asked for a "prompt hearing on the merits" of their bill and, ultimately, for an injunction requiring reissuance of the permits.

A flurry of activity followed the filing

of this complaint. There were motions to intervene, motions raising preliminary objection, answers, extensive discovery. Then, abruptly, activity ceased in February, 1974, and the case lay dormant until the threatened application of Maryland Rule 530 in January, 1976. The rule was suspended, as noted earlier, largely upon the basis that the Blumbergs were making earnest and reasonable attempts to settle the controversy with both WSSC and the county. These efforts were confirmed by the trial testimony of Marvin Blumberg.

When it became apparent that an amicable resolution was not likely, the Blumbergs, whose losses had, of course, increased in the intervening period, filed their amended complaint in October, 1976. This amended bill repeated verbatim, or nearly so, the 39 paragraphs in the original bill. It added four additional paragraphs to the end, only one of which is relevant here. Paragraph 40 alleged that, due to

the revocations, the Blumbergs had been unable to enforce their contracts, causing an increase in construction costs of between 10% and 12% a year, and that the cost of the building had already grown from $20 million to $26 million. In their prayers for relief, the Blumbergs also added two new paragraphs, one seeking $4.5 million in compensatory damages and one seeking $500,000 punitive damages.

The county asserts that this additional claim for damages represents a new cause of action barred by limitations. The rule in this regard was stated by us in Myers v. Aragona, 21 Md. App. 45, 51, 318 A.2d 263, 266 (1974): "if an amendment sets forth a new cause of action, then limitations is measured from the time of the accrual of the cause to the date the amended declaration is filed, but if the amendment does not state a new cause of action, then limitations is determined with reference to the date of the original filing."

It is clear from a comparison of the two

bills that no new cause of action has been pled. All that has been added, proceeding upon the same alleged wrongful acts and the same theory of recovery, is an enlargement of the relief prayed. It is stated in 54 C.J.S. Limitations of Actions § 282, that "[a]n amendment enlarging the prayer of the petition, or the remedy sought, in order to enable the court to award the relief to which plaintiff is entitled on his cause of action, does not introduce a new cause of action so as to be subject to a plea of limitations." The few cases considering the question support that statement. See Davison v. Martin K. Eby Const. Co., 169 Kan. 256, 218 P.2d 219 (1950); Smith v. Wilder, 270 Ala. 637, 120 So.2d 871 (1960); Johnston v. Percy Const., Inc., 258 N.W.2d 366 (Iowa 1977). Accordingly, the claim for damages asserted in the amended bill, being an emanation of the same cause of action asserted in 1973, relates back to the time of filing of the original bill and is not barred by limitations.

Neither is it barred by laches. The county's argument here proceeds not from a delay in filing the claim for damages, but from the delay in bringing the case to trial. This is much akin to an argument based upon Maryland Rule 530 without, in this instance, the benefit of the rule.[22]

Contrary to the assertions of the Blumbergs, "[t]he mere institution of a suit does not, of itself, relieve a person from the charge of laches, and . . . if he fail in the diligent prosecution of the action the consequences are the same as though no action had been begun." Taylor v. Carroll, 89 Md. 32 at 36, 42 A. 920 at 921 (1899), quoting from Johnston v. Standard Mining Co., 148 U.S. 360, 13 S. Ct. 585, 37 L.Ed. 480 (1893). See also Hadaway v. Hynson, 89 Md. 305, 313, 43 A. 806 (1899); Rupp v. Rogers, 118 Md. 534, 85 A. 774 (1912); Stoewer v. Porcelain, etc., Mfg. Co.,

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[22]The proceedings relating to Maryland Rule 530 dealt with a dormancy occurring prior to the filing to the amended complaint.

199 Md. 146, 85 A.2d 911 (1952). Notwithstanding the statement of that principle, however, in fact the Court of Appeals has applied the doctrine very sparingly and only in rather severe circumstances once an action is filed. In Taylor v. Carroll and Hadaway v. Hynson, for example, 20 years of inactivity followed the filing of the complaint; and in Stoewer, the complaint lay dormant for 11 years. In Rupp v. Rogers, the complainant had waited 17 years to file her complaint and then allowed the action to remain dormant for two years, until the defendant had died. Compare Hammersley v. Bell, 134 Md. 172, 106 A. 339 (1919), where the Court declined to apply laches.

The problem addressed in these cases is more appropriately handled now by Maryland Rule 530; and, although it is certainly possible, where the circumstances warrant it, for laches to apply even before that rule would become operative, this is not such a case. The case was tried, as to liability, approximately 13

months after the amended complaint was filed, and, during the interim, the Blumbergs had to defend against a motion ne recipiatur, a motion raising preliminary objection, and two demurrers. As noted, the Blumbergs used the time to attempt settlement of the controversy, and their requests for postponement, which were approved by the court, were designed, at least in part, to facilitate that effort. Given the complexities and underlying currents in this case, not to mention the grossly inequitable conduct of the county that precipitated it, we do not think that the Blumbergs' claim should be barred by laches.

Prior to July 1, 1978, Md. Annot. Code, art. 57, § 18(a), stated that:

> "no action shall be maintained and no claims shall be allowed [against any county] for unliquidated damages for any injury or damage to person or property unless within 180 days after the injury or damage was sustained, written notice setting forth the time, place or cause of the alleged damage . . . shall be presented either in person or by registered mail by the claimant, his agent

or attorney . . . to the county council . . ."[23]

By demurrer, filed one year after the amended bill of complaint, the county pointed out, and reargues in this appeal, that the Blumbergs are barred from collecting damages from the county because they failed to render the notice called for in § 18(a). There is no qeustion that the notice was not, in fact, given to the county council in the manner required by the statute.

The purpose of § 18(a), said the court in Jackson v. Bd. of Co. Comm'rs, 233 Md. 164, 167, 195 A.2d 693, 695 (1963), was to provide the county "with sufficient information to permit it to make an investigation in due time, sufficient to ascertain the character and extent of the injury and its responsibility in connection with it." In Neuenschwander v.

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[23]By Laws of Md., 1978, ch. 770, all of § 18 of art. 57 was recodified as Courts article, § 5-306. One change in substance made by this act was to require that in Prince George's County, the notice be given to the County Executive rather than the County Council.

Wash. San. Com., 187 Md. 67, 48 A.2d 593 (1946), and again in Cotham and Maldonado v. Board, 260 Md. 556, 273 A.2d 115 (1971), the Court of Appeals held the requirement of notice to be mandatory and a condition precedent to recovering unliquidated damages. The effect of these rulings was ameliorated, however, by Laws of Md., 1972, ch. 519, which added a new § 18(b). That section (now Courts article, § 5-306(c)), conveniently ignored by the county, provided:

> "Notwithstanding the provisions of (a) above, the court may, upon motion and for good cause shown, entertain the suit even though the required notice was not given, unless provided further the defendant can affirmatively show that its defense has been prejudiced thereby."

Following the first interposition of this defense, in the county's October, 1977, demurrer, the Blumbergs moved for permission to claim damages, alleging, as good cause, that the original bill of complaint that was filed well within the 180-day period served as adequate notice to the county of the time, place,

and cause of the alleged damages, and that the county had not been prejudiced by the lack of any other notice. The county did not oppose that motion, and, on November 20, 1977, the court granted it.

By failing to oppose the Blumbergs' motion, properly invoking the court's authority under then § 18(b), the county has waived its right to complain on appeal that the motion was granted. Maryland Rule 1085. Even if we were to entertain the complaint, however, we would find it groundless. The county certainly had ample notice of the Blumbergs' complaint, and the probability that, unless resolved, substantial damages might accrue, within the 180-day statutory period. We fail to see how it was prejudiced in any way by the failure to give any other notice. In short, the court did not abuse its discretion in finding the presence of good cause and the absence of prejudice. See Rolfe v. Clark, 269 Md. 14, 304 A.2d 231 (1973); Clark v. Wolman, 243 Md. 597, 600,

221 A.2d 687 (1966).

We have already noted and discussed the provisions of § 1013 of the Prince George's County Charter, waiving the county's sovereign immunity. Part of the original charter that took effect in February, 1971, this provision contained no limitation on the amount of the county's liability, once its liability was established. It remained in effect as originally written until December 2, 1976, and was therefore the law when this cause of action arose, when the original bill of complaint was filed, and when the amended bill seeking a judgment for damages was filed.

On November 2, 1976, the electorate of the county ratified an amendment to § 1013 which, pursuant to § 1105 of the charter, became effective 30 days later. That amendment limits the county's exposure to $250,000 and permits the county to raise the defense of governmental immunity with respect to that part of a claim

in excess of that amount.

The county does not contend that this charter amendment serves to limit the county's liability in this case. It contends that an amendment to Md. Annot. Code art. 25A, § 5, effective July 1, 1976, has that effect.

That section, as noted earlier, is part of the "Express Powers Act", authorizing the charter counties to enact certain types of local laws. By laws of Md., 1976, ch. 825, the General Assembly added a new subsection (CC) to § 5, authorizing such counties:

> "To provide by ordinance or inclusion in the county charter for the waiver of sovereign immunity so that the county may be sued in tort actions in the same manner and to the same extent that any private person may be sued. Any chartered county enacting legislation or otherwise waiving sovereign immunity under this subsection shall carry comprehensive liability insurance to protect itself, its agents and its employees. The purchase of this insurance shall be considered as for a public purpose and as a valid public expense. The liability of any county under this subsection may not be greater than $250,000 or the amount of its insurance coverage, whichever is greater, per individual per oc-

currence. A county which has adopted legislation or otherwise availed itself of the powers contained in this subsection may raise the defense of sovereign immunity to any amount in excess of the limit of its insurance coverage. In any case, the several counties or any county availing itself of the privileges of this subsection may not raise the defense of sovereign immunity in any claim of less than $250,000 or the amount of its insurance coverage, whichever is greater." (Emphasis supplied.)

The county's argument is that the 1976 charter amendment was adopted pursuant to this new § 5(CC), and that since § 5(CC) became effective July 1, 1976 - prior to the filing of the amended complaint - the limitation expressed therein controls in this case. The county overlooks the fact, however, that § 5(CC) is merely an authorization; it did not itself waive a county's sovereign immunity, and did not itself alter the previous waiver of that immunity by the people of Prince George's County. It merely permitted a charter county to enact local legislation consistent with its provisions. Until the county effectively did so, the original § 1013, which, as Bradshaw

made clear did not emanate from or owe its validity to § 5(CC), remained in full effect. Accordingly, the entitlement of the Blumbergs to damages is not limited by § 5(CC) to $250,000.

Finally, the county contends that the court erred in its calculation of damages. The judgment was for $3,673,919, and consisted of three elements: (1) $373,919 for money expended on the project that is not recoverable, primarily payments to subcontractors and architects and the cost of constructing and demolishing model apartments; (2) $1,500,000 for the increased cost of capital necessary to complete the construction, and (3) $1,800,000 for loss of earnings on the profits that would have been made had the building been constructed as scheduled.

The county does not dispute, in particular, the allowance or calculation of the first item. It does contest the other two.

These two items, totalling 90% of the

judgment, were based upon the supposition that, with the direction that the permits be reissued, the building would be built and the Blumbergs would ultimately make a profit from it, either through the sale of condominium units or rents received from apartment units. The court concluded, as indeed the evidence showed, that it would cost more to construct the building in 1979 than it would in 1973, but that the extra cost of construction would be recouped in the higher amounts received from the sale or rental of units. That extra cost was therefore not awarded as damages. Neither was interest on the additional amount allowed, at least not directly.

The court observed that, in order to defray the higher cost of construction, additional capital would be needed, and, whether that capital was borrowed or contributed by the Blumbergs, there would be a cost attendant to it (either in interest if the money was borrowed or in loss of earnings if contributed as

equity). Concluding that the law did not permit the awarding of interest directly,[24] the court decided to award an amount to compensate for the increased cost of capital. There was evidence in the case showing that between 1973 and 1978, interest rates on capital borrowed for apartment construction increased between 1% and 1 3/8% (from 8 1/8 to 8 1/2% in 1973 to 9 1/2% in 1978), and that the cost of that increase, applied to the same base amount borrowed (which other evidence showed would be $17,305,200) would, over the life of the loan, amount to between $1,308,175 and $2,083,347. The court somewhat split the difference and allowed $1,500,00 for that item. This represented, then, not interest on an additional amount that would have to be borrowed, but additional interest on the same amount due to the increased cost of capital. "That is the

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[24] See, however, Carrington v. Basshor, 119 Md. 378, 86 A. 1030 (1913), Pasarew Const. Co. v. Tower Apts., 208 Md. 396, 118 A.2d 678 (1955); Jaeger v. Shea, 130 Md. 1, 99 A. 954 (1917).

value," said the court, "which [the Blumbergs] have lost because the capital would have been that much less expensive and this project gone up" as planned.

The $1,800,000 was based on the loss of time - the delay in the Blumbergs' receipt of their anticipated profits. There was evidence to show that the Blumbergs would have realized a profit of nearly $7,500,000 from the sale or rental of the apartment units and that that sum could have been invested by the Blumbergs at a rate of return of between 7% and 10%. Upon that premise, it was argued that the five-year delay occasioned by appellants' wrongful acts cost the Blumbergs between $3,000,00 and $4,500,000 - i.e., five years income from the investment of that $7,500,000 profit.

The court accepted the theory proffered by the Blumbergs, but not some of the numbers. It said:

> "We are not prepared to say that we will allow as damages the interest on that profit for the entire length of time because we think it has to be

> reduced, number one, because part of the time we do not charge to the County, and, number two, because we are not sure that these men [i.e., the Blumbergs] really felt that seven million dollars would be the exact profit they would make. We think there is enough evidence in this case indicating that there would have been a longer period of time before the selling of the property than they had perhaps hoped and Booz, Allen [Blumbergs' expert] had predicted."

The process by which the court arrived at $1,800,000 is somewhat unclear. It indicated that it would take "as an arbitrary figure" only half of the anticipated profit, which, as noted, the evidence showed would be approximately $7,500,000, but which the court referred to as $7,000,000. It then concluded that the county could not be "charged" with the entire five or six year delay, this being because of the court's doubt that the units could have been sold as quickly as the Blumbergs anticipated. Upon that premise, the court, from the language it used, appeared then to halve again the amount of lost investment income claimed; but the figures don't match that approach.

The court said:

> "We, therefore, conclude that as an element of interest or earnings lost, we have accepted a figure of $3,600,000 as the interest which by any stretch of the imagination could have been earned even if we diminished the whole business more than half. We come up with a final figure of $1,800,000 for lost earning capacity on the money." (Emphasis supplied.)

The court did not indicate specifically what the $3,600,000 represented - where it came from. Was it intended to represent half (or less) of the anticipated profit of $7,000,000-$7,500,000, all of which would then serve automatically to reduce the lost interest from the $3,000,00-$4,500,000 range to half of that, or $1,800,000? Or did it, as the court seemed to say, represent the actual lost interest, which the court then proceeded to halve? The parties suggest that the court actually halved the claim twice, awarding only 25% of what the Blumbergs claimed; but our mathematics indicated that $1,800,000 is more than 25% of $3,000,000-$4,500,000. It appears that the

claim was halved but once.

The county attacks the $1,800,000 allowance on two grounds. First, it says that there was insufficient evidence to establish the marketability of the condominium units, from which the anticipated profits (and thus the loss of earnings on those profits) would arise. We disagree. The evidence supplied by the consultant firm of Booz, Allen & Hamilton, through the report of its vice-president Stephen D. Julius, was sufficient to permit a finding as to marketability, notwithstanding the contrary evidence supplied by the county's expert. Second, it contends that the court's calculation of the damages was arbitrary and speculative. In part because the court itself admitted that its assumptions were arbitrary, and in part because we are unable to understand the actual process used by the court, we agree with the county on this point. The manner in which the court calculated the $1,800,000 was arbitrary and speculative, and we shall therefore remand

the case for a redetermination of this element of damage.[25]

With respect to the $1,500,000, the county contends only that it represents a double recovery - that it represents an increase in cost of construction that will be recovered through higher sales or rental prices. We do not see that it is necessarily a double recovery, but we do feel that it is not an appropriate element of damage in this case because it is inconsistent with a more basic finding by the court. The court concluded that the Blumbergs would recoup the extra costs of construction through higher sales and rental prices, and would, in fact, ultimately realize the profit they reasonably could have anticipated. That is why no damages were allowed for loss of profits. We fail to see, however, how the additional cost of capital needed to defray

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[25]The county has not raised the underlying issue of whether this type of loss is properly recoverable as damages under any circumstances, and we therefore do not address or decide that question.

the cost of construction is anything other than part of the overall enhanced cost of the project itself that also can be recouped. If there was sufficient evidence to show that, for whatever reason, this increment of the overall extra cost could not be so recouped, there would then be an element of lost profit that could be awarded; but, in the absence of such evidence, it is, we think, inappropriate to award damages specially for the higher cost of capital. Upon remand, therefore, the court may not include that element in a judgment for damages.

(6) Conspiracy

In two separate but related arguments, the county urges that it is not vicariously liable because of the conspiracy of Gullett, WSSC, and various other people. We have already addressed the question of the county's liability, and the sufficiency of the evidence to support it; and we need say nothing further.

(7) Appeal of WSSC

We leave now the issues raised by Prince George's County and consider the appeal of WSSC. It presents one issue: whether it was justified in suspending and later withdrawing its water and sewer permits.

The thrust of the Commission's argument is that the permits never should have been issued in the first place - that their issuance was in contravention of the various Resolutions the Commission had adopted and was induced by faulty advice given to it by its staff. It contends, as a result, that it had no authority to issue the permits and that, when given the opportunity to reconsider the matter following suspension of the building permit, it had no authority to allow the project to proceed. For this, it relies on our decision in Rodgers v. Wash. Sub. San. Comm'n, 32 Md. App. 664, 363 A.2d 633 (1976).

We find that case to be inapplicable to the situation before us, and we find the Com-

mission's argument to be without merit.

It is true that, had the Commission denied the application and declined to issue the permits on October 25, its action would have been justified by and consistent with the four Resolutions. A building permit had not been issued, and the water and sewer permits had not been approved by the Commission in accordance with the Resolutions prior to August 2, 1972. However, unlike the Resolution apparently at issue in Rodgers (see 32 Md. App. at 666, 667, 363 A.2d 633), Section 3(c) of the August 23 Resolution authorized the Commission to waive or suspend the operative and inhibitory provisions of the Resolution "for good cause shown", in addition to the more specific exceptions stated elsewhere in the Resolution. This general "escape hatch" was not affected by the two subsequent Resolutions of October 4 and 25, and thus was fully operative when the decision was made to grant the permits at issue here. The Commission, therefore, was not precluded from

approving and directing the issuance of the permits.

WSSC stresses, in support of its "mistake" argument, part of the testimony of its director of engineering, Mr. Stapp. Stapp admitted that he believed that the Blumberg permits had been approved back in April, 1972, and that he probably conveyed that belief to the Commission when he met with it in executive session on October 25. From this, the Commission argues that it was given the mistaken impression that the permits had been authorized prior to August 2, and were not barred by the various Resolutions.

This argument overlooks the further testimony of Mr. Stapp that the Commission acted under the more general exception - ¶3(c) - rather than in error. It will be recalled that Mr. Stapp had sent a packet of material concerning the Blumberg application to each commissioner with a covering memorandum clearly pointing out that the application was still

pending and had not previously been approved. He was asked, on recross examination, whether, to his knowledge, the Commission made a finding that there was good cause to make an exception with respect to the Blumberg application, and this colloquy ensued:

"A I would say they must have.

Q But did they to your knowledge?

A They must have because they instructed that the projects be dealt with by the staff.

Q That was based upon this report that you had given to the Commission, isn't that correct?

A Based upon the information they had, yes.

Q Your office provided that information to them?

A Right, right."

From this, it is clear that there was evidence sufficient to warrant a finding that the Commission did not act in error, but, given the "hardship" status of the Blumbergs, the prior assurances given to them by staff personnel, the time, money, and effort expended by the

Blumbergs in reliance on those assurances, and the recommendation of the staff, the Commission simply found good cause to waive the Resolution. Even if the Commission acted in error, however, because it had the ability to waive the Resolution, we cannot say that the approval and ultimate issuance were illegal. That a government agency acts in haste, error, or confusion, and later regrets that it did so does not make its action, otherwise lawful, void.

From the testimony of Messrs. Gullett and Elliott, coupled with the language in the WSSC Order of April 11, 1973, the court was justified in concluding that the Commission's subsequent actions were unwarranted and unlawful. The Commission did not suspend "the efficacy" of the water and sewer permits because of any concern over water quality, or for any other legitimate purpose, but only in obedience to a patently political directive of the County Executive that the Commission Chairman felt it was his duty to follow. Had that improper act not

occurred - had the Blumbergs been able to continue their construction activity at the pace described by Marvin Blumberg - it is doubtful that the further WSSC action of May 30 would ever have occurred.

Accordingly, although an opposite conclusion could have been reached, we do not believe that the court's findings as to the Commissions's actions and motives were clearly erroneous or contrary to law. Its directive to WSSC to reissue the permits will therefore be sustained.

(8) Liability Of WSSC For Damages

WSSC's initial response to the amended complaint seeking damages against it was a motion raising preliminary objection under Maryland Rule 323a 8 and 9 (want of necessary parties and governmental immunity). It alleged that, as to the issuance or non-issuance of permits, it was performing a governmental function, and that, with respect to the claim for

damages, it enjoyed "sovereign and/or governmental immunity." WSSC reiterated this defense in a subsequent demurrer.

The court ruled against WSSC on the basis that the issuance of permits was a proprietary, rather than a governmental, function. Subsequent to this decision (but prior to its being reduced to a written order), this Court decided Snyder v. State Dep't, 40 Md. App. 364, 391 A.2d 863 (1978), cert. den. 284 Md. -- (1979). In that case, based upon prior decisions of the Court of Appeals, we concluded that the determination to issue or revoke a permit is a governmental funtion, and that a municipality enjoying sovereign immunity for its governmental acts was not liable in tort by virtue of such a determination. Armed with this decision, after trial on the issue of liability, WSSC requested the court to reconsider its earlier decision. The court did so, and, on the basis of Snyder, granted WSSC's motion as to the question of damages. It concluded that,

because WSSC was acting in a governmental capacity, it enjoyed governmental immunity and could not be held liable in damages.

Once again, however, an appellate court decided otherwise. In Katz v. Washington Sub. San. Comm'n, 284 Md. 503, 397 A.2d 1027 (1979), the Court of Appeals held that WSSC was a State, not a municipal, agency, but that by § 1-3 of the Washington Suburban Sanitary District Code, the General Assembly had waived that immunity "with respect to tort actions." 284 Md. at 515, 397 A.2d 1027.

WSSC attempts to avoid the clear import of Katz by suggesting a distinction between sovereign immunity, which it no longer has, and "performing a governmental function" which, it claims, still insulates it from responsibility. We fail to see the distinction in that context. In contrast to the situation with municipal agencies, the distinction between governmental and proprietary actions has no relevance with respect to the State or State

agencies. See Austin v. Mayor and City Council, 286 Md. 51, 405 A.2d 255 (1979). Where sovereign immunity has been waived, the fact that actions are performed in a governmental capacity does not provide immunity where the actions are malicious or amount to an abuse of authority. Bradshaw v. Prince George's County, supra, 284 Md. 294, 396 A.2d 255. In light of Katz, and based upon the findings of the court and the evidence in support of them, we conclude that WSSC is answerable in damages for its wrongful acts. We shall therefore remand that part of the case to the circuit court for a determination of whether, and to what extent, a judgment for damages should be entered against WSSC.

ORDERS DIRECTING PRINCE GEORGE'S COUNTY AND WSSC TO REISSUE RESPECTIVE PERMITS AFFIRMED; JUDGMENT FOR DAMAGES AGAINST PRINCE GEORGE'S COUNTY AFFIRMED AS TO LIABILTY BUT REVERSED AS TO AMOUNT OF DAMAGES; ORDER DISMISSING ACTION FOR DAMAGES AGAINST WSSC REVERSED;

THAT ORDER AND JUDGMENT FOR DAMAGES AGAINST PRINCE GEORGE'S COUNTY REMANDED TO CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION; ORDER SUSTAINING DEMURRERS OF CROSS-APPELLEES GULLETT AND KELLEY SUSTAINED; COSTS TO BE PAID 1/3 BY WSSC, 1/3 BY PRINCE GEORGE'S COUNTY, 1/3 BY CROSS-APPELLANTS.

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

[dated May 9, 1978]

HERSCHEL BLUMBERG, et al.	*	
v.	*	Equity No. D7901
PRINCE GEORGE'S COUNTY, MARYLAND, et al.	*	

ORAL OPINION

THE COURT: Now, gentlemen, we come to a decision in this matter, the question of what may be called a liability aspect of this case, damages having been set aside for separate proof once we get past his point.

I want to say at the onset of these remarks that this member of the Court has enjoyed presiding in this case, and we compliment counsel on their spirit of cooperation with each other, and on the good feeling that has prevailed throughout this trial and in the pretrial maneuvering that has gone into this case.

Certainly although the Court has some criticism of the conduct of other public officials, we have nothing but the highest praise for the conduct of the members of the Bar associated with this case during the time this member of the Court has been connected with it.

This is, of course, a very interesting case to this member of the Court, partly because the stakes are very high, and partly because it is a complicated type of thing which is something that whets the curiosity of this member of the Court to see if we can find out what really did happen, and if possible, why it happened the way it did.

And we say that in evaluating the testimony and the evidence in this case, we are impressed by the appearance, demeanor and accuracy of the staff members of the Defendant Sanitary Commission, including their counsel, both as to his legal ability and integrity. And, of course, I refer now to counsel who testified, Mr. Kenkel, and of course our knowledge

of him goes back a long way.

We are also impressed with the staff members of the Commission who testified with the exception of the Commissioner. Now, it's pretty obvious to the Court that these staff people were doing the best they could, and that they were dealing as fairly and as honorably as they thought they could with the applicants in this case, consistent with the fact that ultimately and finally some political animal had the final say. I think it's on that basis that the whole matter in this case went astray.

Now, the evidence in this case, in general, deals with some specific parts, which I will deal with in a minute, that demonstrates to the Court that the applicants, at all times, under the very best of their ability, did everything they could to comply with every applicable regulation or ordinance or procedure, either formal or informal, which would have been necessary to enable them to lawfully develop this land in the way they had envisioned

which, by their lights, was a good thing for the County, the area, the people they were going to put in it, and themselves and which, according to their lights, would have been a benefit for everyone concerned and a tremendous financial undertaking and risk for them.

Their dealings were totally honest, aboveboard, frank and accurate, so far as the Court is able to determine.

At the temporary end of the project, which may turn out to be the permanent end of it, they were faced with duplicity, double-dealing, subterfuge and bureaucratic inertia, self-induced and deliberate, and because of the complexity of the volume of business going through these offices, and a large number of officials and responsible agencies to which they had to turn, this bureaucratic inertia, if deliberate, becomes, as it did in this case, a total roadblock to any further development of the project.

Now, the facts in this case, as the Court

understands them to be, are that it's modern history, and I say modern history. It's present history we perceive which does not go all the way back to the beginning of its existence, but, starting like a good storyteller should in medias res. We commence with July 16, 1971.

The project goes back beyond that, but we take that as the beginning point of what is significant in this case. On that date, Mr. Plaintiff's attorney, then attorney, not present counsel, sent a letter to the Washington Suburban Sanitary Commission asking if this project, which they had had in mind for some time was forbidden by the sewer moratorium, and I put that in quotes, "the sewer moratorium," which had come along between the time they acquired this property and thought about what they were going to do, up until 1971.

The so-called, "sewer moratorium," by Dr. Solomon was laid down in 1970.

Now, since that was a very simple thing, but like a lot of other simple things nobody

could believe how simple it was, so they insisted on making it much more complicated and involved, and elaborated upon it, and it eventually grew into quite a problem with everybody, and nobody knew what anyone could do.

So these men, faced with the outlay of millions of dollars of their own, decided - and a good many millions of somebody else's who was going to entrust to them - decided they would find out as best they could whether they had any hope of going ahead with their dreams for this property.

I say at this point, "dreams," as opposed to plans, because until you put your dreams down on drafting paper and reduce them to blueprints, such as we have here, they still remain, I guess, just dreams.

Anyway, they sent a letter to the Defendant Commission with a bunch of exhibits asking the question, "Does the sewer moratorium stop us from doing what these exhibits indicate we want to do?" Of course they got an acknowledg-

ment from the Secretary that their letter had been received and referred to the Legal Department.

Eventually they got a letter back from the Legal Department. Mr. Hefferon gave an opinion which coincides with the Court's opinion today; so, therefore, it must be correct that this moratorium that Dr. Solomon had pronounced, did not affect this project, and it didn't, and it never did, and the reason for that, as the Court understands it, is very simple. Solomon's moratorium didn't have a thing in the world to do with the proprietary function of the Commission in approving connections to existing lines. It had to do with the governmental function of the Commission in approving extensions or new sewer lines to new areas where sewer lines previously didn't exist.

Not only did sewer lines exist in the streets alongside the project, they crossed it, and not only did they cross it, but the Commission's engineers to this very day say that

those lines are adequate to carry away the expected sewage produced by this project when it's built in full. Therefore, the Solomon moratorium never applied to this property.

Now, with that heartening news, other than what they mistakenly thought was heartening news from the legal office, of the Defendant Commission, they then go about to convert their dreams into reality, and the first step, of course, is to hire Vosbick, Vosbick, Kendrick & Reddinger, architects, to create a set of plans.

Well, they did all that and they sent those down to the Commission. Due season they were studied. Due season they were studied and the application was made in April of 1972. The proper officials at the Defendant Commission studied that application, counted up whatever it was they were supposed to count up, and made their estimate of how much it would cost the Defendant to connect their project to the existing sewer line.

Now, we get into a little misunderstanding here about terminology, what seems to be very simple to the Court, but what caused a lot of hassling around amongst the testimony in this case. Maybe the record won't be so clear about it, so we will comment here that we perceive two different things in the way of permit fees paid in this case.

First, you have the cost to be paid to the Defendant by the developer for hooking his sewer line coming out of his building to the sewer line of the Commission which carries the sewage away. That was the first fee that was determined, and checks were given for that in full.

And the testimony, unrebutted testimony here clearly shows that once that is estimated, it never changes. Nothing is added to it, no additional fees or anything.

The engineers at the Commission are able to estimate that precisely and accurately, and no change is ever made in the history of these

men's recollection anyway, no change is ever made.

What does change sometimes, and is subject to further calculation and collection at a later date is the fee which is paid by the builder to the Defendant Commission. I say, "builder" - the plumber or the builder or something for the builder - is an inspection fee to cover the cost of the inspector who comes around and makes sure that the connections in the building to the fixtures and lines and all this business are correctly done.

Now, that may change, because the number of stories and the number of fixtures and everything may change, and therefore, the number of inspections may change, but we are talking here about this first permit to hook the building to the main sewer line, and that, nobody questions.

An application was made, charges estimated, and the fee paid. Checks were given. Nobody ever said those checks weren't

good, or they couldn't be cashed, or any question about how this was.

Now, in fact, as I understand it, about that time something happened over in Montgomery County. A storm blew up in the Commission and nobody got around to cashing those checks or doing much of anything, except answering the telephones from irate Montgomery Countians for the next four or five months or so, and when they finally got around to doing something else with this application, a whole series of maneuvers by the Sanitary Commission had intervened.

During the period from April, when this application was made, to October the 25th of 1972, when it was approved by the Commission at a meeting of the Commission, itself, several things happened. The Commission wasn't satisfied that Dr. Solomon's order was doing the job on reducing what was being taken into their sewage treatment plants. So they determined that they would cut Herod, Herod, or out

Solomon, Solomon - whatever analogy you would like - they decided that they would be even more restricting than he was, so they passed a monumental piece of fine print paperwork.

Attached to this record is Exhibit No. 30, and they illuminated Resolution 72-053 and 72-053, in part, refers to the Anacostia Drainage Basin in which this project is located.

The only parts of all this that we find significant are found on Page 17 of that exhibit. It might be best to say that it's Section IV, A, 4 in part - and referring to things which I described in 1, 2 and 3 which have no application of the type of project, it says, "Any other application for a connection and/or hookup not comprehended within those provisions but involving unusual circumstances which might warrant approval of the requested service, are subject to approval only by Commission action."

I would want to put a pin on, "unusual circumstances." I am going to say something

about that in a minute.

It was that exact phrase that Mr. Stapp, lo these many years later, testified right in this case and said applied to this particular project.

In spite of all of Mr. Sisson's sophisticated and diligent efforts to make Mr. Stapp say something about permits approved or issued, Mr. Stapp just simply said, being an engineer and a direct and straightforward person, and not a devious legal type whose principal function is to make words seem to say something they don't really say, says there were unusual circumstances in this case. It was subject to Commission approval as a body, and I think that the circumstances were unusual.

I think, says he in testimony in this case, that Blumberg's application fell within this unusual circumstance provision which the Commission, itself, had reserved to itself the authority to do something within the first, the very first of this series of restrictive reso-

lutions which they imposed upon themselves.

Now, the thing goes on to say, "In acting upon such requests the Commission will consider the expected flows to be generated from the property in its sewer benefit assessment classification and such other relevant and equitable factors as the applicant believes warrant action upon his request, including the showing made by the applicant of his acquisition or arrangements to purchase the property subject to the request prior to this date."

Now, these applicants didn't have to show that they intended to purchase the property. They already owned it. They not only owned it, but they had developed part of it and had substantial plans to develop the rest.

It's not a case of somebody coming in and saying, "I want to buy a piece of property, can I get sewerage? If I can't, I am not going to buy it." The man says, "Yes, you can." He goes out and buys the property.

He already owned the property, but he had

spent considerable money at this point in getting plans to develop the property in reliance on the prior indication.

The next item, ". . . the indications of sewer availability, if any, provided prior to this state in written WSSC communications."

Now, what better indication of sewer availability can you have than that letter from the counsel saying that it didn't fall - when I say, "counsel," I mean legal counsel of the Commission, not the other council - saying that sewer was available, and Solomon's order didn't prohibit it. That's beyond question, the best indication, I think, that a man can have if the Sanitary Commission's lawyer writes and says, "Yes, you can get sewerage."

Then, finally, it says, ". . . and the enhancement of the commercial activity" - no question it was going to enhance commercial activity if nothing else for plumbers, electricians and concrete layers. Concrete layers certainly would have a field day - "industrial

facility" - maybe some question about that, but finally - "or dwelling unit pattern of the County, as the case may be."

Now, there is substantial testimony in this case that at this time this very type of project was a highly desirable change in the dwelling unit pattern of the County, and before Mr. Gullett and a few of his colleagues on the Council gave in to a few people in the community who didn't like tall buildings, he thought so, and so did the rest of the County. That's a matter of substantial evidence in this record.

Now, so far as I am able to determine, that section of ordinance or Resolution 72-053, together with E says - I will quote this in full - "Applications for connections and/or hookups to existing WSSC sewers are subject to periodic review by the Commission for determination of available capacity in the lateral sewer lines and in the system through which the sewage generated therefrom flows" - we have no

question about lateral lines. The engineer's testimony then and now is that we have plenty of line, plenty of lateral line. There is some question about whether we have enough of the rest of the line or had enough at the time, but I am unable to find, and I put a pin here, that insofar as their portion of this paragraph dealing with the system through which the sewage generated therefrom flows, I don't find any evidence which persuades me that any engineer ever determined that this project ought not to be built, simply because of the amount of sewage it generated. There is absolutely no evidence to that effect.

There is evidence here of overflows, but that overflow chart doesn't support the Court making an independent inference that excessive load on either the transmission lines, the junction box or the Blue Plains Plant was the reason why the Commission attempted to withdraw its permits.

The reason I say that is that there is no

compliance with the last line of this paragraph which is, ". . . and if there is a finding that such capacity is not available, any application may be rejected or returned."

Now, that paragraph says if we find that we can handle what you are going to give us, either because our lateral lines won't take it, or the main line and the system as a whole - I am not too sure that I interpret this paragraph to mean treatment plant, because if you apply the general rule that terms refer to the next generic term in order, all of this refers to, "lines," but we take it that the lines encompass the pumping station, at least, and we have some question about the capacity they had at that time, because they had overflows.

But this paragraph doesn't permit or authorize the Commission to take back a sewer permit once it had issued it. It merely authorizes the Commission to have a hearing, to make a finding, either formally or informally, either in executive session or in an open ses-

sion, but at some time have an engineer say, "Look, Executive Towers is going to have 600 years at 200 gallons of sewage a day, and we just can't take that sewage. We don't have the lateral lines to take it away, pumping stations to pump it, and Blue Plains can't digest it, so therefore, Mr. Commissioner, don't authorize the permit."

No such thing was done in this case, and this paragraph wasn't followed. I think it had to be followed if they were going to deny this particular permit. I am not sure that it legally authorizes the revocation of the permit, but the Commission would have been on much sounder ground if they would have done it this way, and attempted to now reactivate this paragraph of this Resolution No. 72-053, than the way they tried to do it.

Now, following Resolution No. 72-053, there comes a whole series of Commission resolutions which somebody mistakenly thinks has anything to do with this case. I don't per-

ceive that they have an earthy thing to do with it.

Now, I will take them in order, numerical order.

73-066. That thing suspended the provisions of the Commission to deal with cases exactly like our case here, except that it said, "The Commission may amend, suspend or waive the provisions of this Resolution for good cause shown, either on the Commission's own motion or upon written application or petition demonstrating good cause for Commission consideration of the matter."

They say the Commission must first determine that good cause has been shown. Now, that might conceivably be believed to have something to do with our problem, except that it really didn't change anything.

It did have some other provisions which really didn't have too much to do with this case, but all it said was that if Commission finds good cause, it can continue or consider

application for hookup to existing sewer lines.

Now, that didn't seem to go down too well, because apparently everybody thought that meant you couldn't do anything, and not doing anything wasn't satisfactory, because, of course, there were people to whom they wanted to do something.

So then they come back with Resolution 73-075, and getting up now into October - the first one I said was August the 2nd. Nobody was satisfied with that, because apparently the staff construed that to mean that nothing could be done by anybody, including the Commission.

So they came back with a Resolution 73-075, and I gather that this is the so-called 365 day resolution.

MR. SISSON: No. It's the next one.

THE COURT: The next one?

MR. SISSON: Yes.

THE COURT: This one says 365 days.

MR. SISSON: I stand corrected on that.

THE COURT: Well, it says, if I understand

the import of this - it concerns itself with active authorizations, and its principal thrust has to do with sewer lines which have been authorized but not yet built.

Now, what the Commission is saying in this resolution is that if we authorize a sewer line to be built from A to B, and along that distance somebody applied and was approved to be hooked into it after it's built, we have issued a sewer permit now to somebody who hasn't got a sewer built on his own property to be hooked into a sewer line belonging to the Sanitary Commission which it has not yet built.

If you get that situation, the man who has the authorization to hook into the WSSC line, has got to hook into it within 365 days from the date the sewer line is put into service; that is, the WSSC line, and if the application to hook into that line by someone who doesn't have authority to hook into it - ". . . if the application is tendered for filing, with requisite fees" - I am quoting now - "within one

year (365 days) after the Commission has completed and placed the sewer line in service, with the date of placing in service being the date from which the 365-day period shall commence to run, the item shall be deemed one implementing an active authorization."

Now, that's reversing around a little bit the way the thing reads. What they are saying is you come within the definition of this resolution which dealt with the granting by the staff of permits without further Commission action for those which fell within the original purview of that first one, two, three of 72-053.

None of this had anything to do with, as near as I can see, what we are dealing with in this case. It didn't apply to this property, because under the original resolution, the staff couldn't do anything with this permit. It had to be approved by the Commission.

Then, we come to October the 25th, which is a day of some significance to the decision

in this case.

On that day, after repeated efforts to find out what was going on at the Commission, why they weren't able to get themselves an answer on very simple questions they requested, on that day the Plaintiffs showed up and the Commission, at long last, heard the matter.

Now, what happened isn't in any dispute. The legal consequences of it are in dispute.

The Commission had several applications. One of them was this one. Their engineer presented a package, which is in evidence in this case as Exhibit No. 32, I believe.

THE DEPUTY CLERK: Thirty-two is one of those resolutions.

THE COURT: Thirty-eight. I think it was eventually admitted as 38.

Anyway, the exhibit starting with the summary sheet - it was either 35 or 38.

THE DEPUTY CLERK: The summary sheet was 38, sir. It was not admitted.

THE COURT: Thirty-five was the summary

sheet.

Anyway, 35 and 38 are apparently the same thing. Anyway, Mr. Stapp presented this summary sheet when his staff prepared it, indicating what the staff knew about Plaintiffs' application.

It's obvious from his testimony, and from what happened, that it was of no consequence to him whether the fees had been paid and that notation made on this particular application or not. A great deal has been made of that in the testimony in this case, but we consider it totally irrelevant to the decision.

I gather that because of some in-house knowledge, some custom and usage peculiar to the Defendant Commission, if the paid stamp was put on the application, you could look at that paid stamp and tell from it that all the various technical people had approved it, because until they did, they didn't stamp it paid, even though the check was attached to it many, many months ahead of time.

Now, if this was that kind of case, that might be significant, but we don't see any significance to it in the decision of this case, because in this case, it was an unusual case. It was a huge project. It didn't fall within that one, two, three routine paragraphs of the resolution that they were dealing with which wasn't any of these intervening ones. It was still the original one, and Mr. Stapp, being concerned only with what he had to do, frankly admitted he was under the impression that the thing had been stamped paid, but he didn't really know and he didn't really care.

He undoubtedly knew that the check was attached to it to pay it, and in this case he didn't attach any importance to the stamp being there, because whether the stamp was there or not, it still had to be treated as an unusual case under the terms of Resolution 72-053, and the Commission still had to approve it.

After discussion and Mr. Stapp's statement that the inquiry had been made and re-

sponse had been made, and all the people had approved it and all, the Commission approved the issuance of these permits, and they had an absolute legal right to do so. There is nothing the Court finds in any of these resolutions which inhibited them from doing so, and indeed, they were authorized and required to do so under the terms of the restrictive resolution which they had imposed among themselves.

We do not agree with the argument made by their attorney in this case that they had to follow and stay within the guidelines that they had imposed upon themselves. They couldn't impose a guideline and then go off and do something contrary to it.

We find, as a matter of fact, that they did exactly that. They heard it. They considered all they knew about it. There was no determination that their lines couldn't handle it, and they approved it and directed the staff to process it.

Now, the processing, apparently, took as

long as several of these others. They decided they had to have some sort of resolution, and they attempted, as counsel said, hurriedly and without sufficient prior planning and study to adopt a general resolution that would cover this case, 73-080. It didn't, but we don't find that that has anything to do with the legal effect of their action in this case.

Their approval arrived at in executive session and announced in public session, and communicated directly by the Chairman of the Commission to the applicants is sufficient approval under the resolution which really controlled their actions in this case, 72-053.

Now, subsequent to that, the permits were, in fact, issued. The Court finds, as a fact, and there is also no question, that those are valid permits. The plaintiffs undertook construction within the time required. They made substantial progress on that construction until they were ordered to stop by Prince George's County Inspections and Permits Of-

fice, and when they received the order to stop, they stopped.

Now, that order to stop is sort of a serious thing in itself. Mr. Blocher, in his argument, used an expression that is sort of pitiful in a way, but stuck in the Court's mind.

He said that Mr. Gullett's one telephone call ended everything that these men with all their efforts and expenditures of money were able to do in nine months, and if you wanted to pick one sentence to summarize what happened, that's about exactly what happened. It summarizes about as well as anything.

We find, as a fact in this case, that after the hearings before the National Capital Park and Planning Commission, which was, in fact, the agency that was charged with approving the height of these buildings and their appearance, and their location, and their impact on the neighborhood, and all of those things which have to be considered, and realistically

so, in development of a project of this size, all of those hearings were held, the appropriate notices were given, everybody had a chance to have his say, and that agency approved this project.

Mr. Gullett, at that time, thought it was a good idea, just what the County needed. Now, of course, he testifies here, "Oh, well, what he said didn't mean anything." Which, parenthetically, was probably true, because depending on what you heard him say, it could be one thing, or it could be another. I heard him say a lot.

Anyway, nobody in the neighborhood paid any attention to that. All these people, who subsequently now rise up and say we don't want this tower next to us, blah, blah, blah, blah, got no money on the table either way, they are not going to have to pay, unfortunately, any part of the judgment rendered in this case, nor are they going to have to contribute to the losses of the developers in this case, but

they, then, were quiet, didn't pay any attention to that.

So, people who are charged with the responsibility of deciding for the citizens of this area what is and is not acceptable, decided that it was acceptable, good, and ought to be done, and they approved it.

Unlike the Defendant Sanitary Commission, they had the courage of their convictions. They never reneged on that decision.

They approved the first application. They approved the second application, and the evidence shows that at least if the National Capital Park and Planning Commission thinks it's right, you cannot jerk it around any other way but the right way, because I no doubt know that evidence could be brought in that some pressure was applied to them too, but they stood by their guns. They said it's a good project, it's acceptable, the height is okay, and it's their function to decide that, not Mr. Gullett's, not Mr. Novak's, and not Mr.

Elliott's either.

Now, great amounts of soil eventually moved, concrete trucks are rolling, and someone says, "What the hell is going on down there?" Everybody decides they better find out what's going on down there. A lot of noise, a lot of confusion, a lot of workmen.

"What is Blumberg getting ready to do now?"

Well, by Joe, they find out that Blumberg is getting ready to build a monstrous project, 39 stories high. A regular mountain of a building. So everybody says, "That won't do. We don't want that next to us. We don't want that in this area. What can we do?"

And like all good Americans and fine citizens of this democracy of the people, by the people and for the people, they decided what they can't get one way they will get another, and whether they are right doesn't make any difference. It's what they want that counts.

So they go down to Mr. Gullett and they

say, "Mr. Gullett, we got a lot of votes. We are unhappy. You stop this project."

And just as positively as I am sitting in this chair, if I had been standing beside him and watched him do it, Mr. Gullett took into assessment how many votes were involved in this project, and since dollars don't vote and people do, the Blumbergs lost out.

Mr. Gullett suddenly was going to stop that program, notwithstanding his previous endorsement, and notwithstanding the fact that he thinks it's great for Prince George's County, that it's just what the County needs, that it's going to save the County from the vise of garden apartments, and exactly what the tax base needs and everything else. No. If there is any way to stop it, we are now going to stop it.

And so he turns to his minion, Mr. Maloney, who is then running the newly created Office of Law in Prince George's County, and that is where he comes up with what is really

an outstanding plan. He says that the Blumbergs don't have a contractor's license, and as of January 1st there is a law passed that says he has to have a contractor's license, and what do you suppose, they made an application back in November for this building permit and they didn't list on there a contractor with a license under the resolution or ordinance which wasn't passed until January the 1st.

Therefore, their building permit is not inaccurate, it's not in need of some revision or bringing up-to-date, it is totally void, never existed.

Therefore, Mr. Office of Inspections and Permits sends out a stop work order on this project, because they don't have a licensed contractor in accordance with this January license law named on the application for their building permit.

Well, now, as one might have expected, anybody who has sense enough to plan and ac-

cumulate enough money to build a $27 million building, isn't exactly stupid. The Blumbergs had heard about this foolishness, and somebody had told them about this law, and they had looked at it and said, "Well, this doesn't apply to us," and the Court, without deciding - because it is immaterial to the way the Court is going to decide this case - concludes that if the law as it was stated in the evidence in this case, it didn't apply to them.

But like any sensible person dealing with the Government, if they had the $15 to pay for the permit, and that was going to hold up a $27 million project, why fool around, get the permit.

They didn't have to pass a test or demonstrate they knew a board from a nail or a soffit from a hold [sic] in the ground. All they had to do was pay $15 and fill out a piece of paper, so they did it, and the sequence of events in that case is curious in itself.

They intended to start construction the

latter part of March, 1973. They had to start, as the Sanitary Commission had instructed them to do, within six months from the issuance of their permit. If they didn't, they lost the permit.

That's a very reasonable thing. The idea behind that was that the Sanitary Commission didn't want somebody to get a permit and just sit on it since they had a lot of other applications for permits. They also didn't want people to get permits and shop them around, see if they could sell them to somebody else.

So, they said to start within six months or you lose your authority to start.

The Plaintiffs, in this case, certainly didn't want to do that, so they went ahead very promptly without going back to ask for any extensions or any other problems. They planned to put something in the ground in March of 1973, and they broke ground March the 29th.

Meantime, they had heard about this permit contractor's license law, so they made an ap-

plication for the necessary license on the 28th. Now, that was the day before they broke ground, and unlike the sewer application, which they had no reason to expect, as Mr. Sisson argues, correctly and ably, that they were going to get, just because they applied for it for this project, they had every reason in the world to expect that they were going to get this contractor's license just because they applied for it if they paid the fee.

So, whether or not they actually had the thing in their hands or didn't have it in their hands, I don't believe was either a great legal or moral or ethical dereliction on their part. They did just what anybody else in their right mind would have done.

They applied for the thing, figured they would get it in the mail dated the same day of the application, sooner or later, which is what generally happens, and pay the fee and went on about their business.

The evidence in this case shows that the

County hadn't even set up any machinery for issuing these licenses at that time. Not only did the contractors not know they had to have them, the County apparently didn't know they had to have them, or didn't take any steps to set this board up in advance of the date the law took effect.

If the contractors didn't know, we think they could be pardoned, but we don't think we could pardon the Office of Law for not, at that time, taking steps to see that those who had to have this vitally important document could get it when they applied for it.

Anyway, they issued some sort of haphazard temporary license, because they didn't have the machinery for issuing the permanent one, and that thing was dated April the 5th.

Later on, the fullness of legal wisdom we understand from the evidence in this case is that that was declared invalid too, along with the permit. Well, so far as it relates to this case, it has absolutely no effect at all, ex-

cept that it furnished part of a flimsy legal excuse for taking action which wasn't based on that reason at all, but on an entirely different reason which was an improper one, in any event, because the stop work order which gave as its reason for being sent out that their name of the contractor on the license was not a proper one, wasn't any good when it was sent, because by that time there was a license for the named contractor.

The stop work order didn't go out until the 12th of April, and had the Office of Law checked with the issuance of the license, they might have found that the license was issued April the 5th, seven days before the stop work order went out.

Once having stopped the project, it was a simple matter to keep it stopped, because from the evidence in this case and the demeanor of the witnesses on the stand, the Court has no trouble concluding that Mr. Elliott, who was the principal moving force as the Chairman of

the Commission, was totally subservient to and dominated by, and subject to the control and instruction of Mr. Gullett in the County Executive Office.

No plainer evidence of that could have been produced than the testimony of those two men in this case. Mr. Elliott not only took the action ordered - I say ordered in the sense that if one has the power to compel something to be done by requesting it to be done, that doesn't change the fact that it's an order, and no matter how much velvet there is on the hand, if the grip under the velvet is sufficient to immobilize you, you are captured.

Mr. Gullett simply had one of his aids call his servient agency and said do this, and not only did he do it, but he promptly called back to report to his master that it was done, even as he had ordered.

What happened in that case was that the County didn't really have any firm grounds about this permit thing. That, obviously, was

the flimsiest, plainest sort of subterfuge. The only advantage it had was that it was immediate. It stopped right where you are, whereas the action by the Sanitary Commission had to have a little bit more deliberation, or two more people were involved in it. Who knows. Maybe somebody down at the Sanitary Commission would say, "Don't do this. It's wrong."

So having stopped the project immediately, it then instructed somebody from the Sanitary Commission to withdraw or do something to say that he doesn't have sewerage, and the Commission, in response to that, did something of what they call suspending the efficacy of the permits which, in effect, says you don't have sewerage anymore, and then, eventually, they come up with this business about the fact that they were illegally issued, and therefore, they were void, and therefore, we are sorry but you don't have sewerage anymore.

We don't think that's right. We don't think that government ought to act with such a

demonstrated lack of integrity, and we think that the principle of law that a person has the vested right in a permit such as this was designed to protect the citizen who does everything that he is supposed to do from the arbitrary and capricious whims of political winds in the area.

WSSC has never made any finding that this project couldn't be served by their lines, by their pumping stations, by their junction boxes, their forced mains and all the rest.

The testimony of the engineers as to overflows didn't say that this project had to be denied a sewer permit because it couldn't be handled. The bare evidence about overflows is that the thing overflowed in those days every time they had a rainfall in excess of a certain amount.

Those overflows ran into gallons per minute higher than it's conceivable to believe. Nine thousand gallons a minute, and one of them, I believe, is 15,000 gallons a minute.

That's an overflow of unbelievable proportions, but none of that had anything to do with whether this project was on the line or wasn't on the line.

Two thousand gallons a day seems like a lot of sewage to be coming out of one project - what did I say back there, 200 or 2,000? It should be 200,000. That's even more. Two hundred thousand gallons a day sounds like a lot of sewage until you start talking about how many millions of gallons these pumps will pump, and how many millions of gallons a day these little plants will handle. Even a little plant, as was described.

Anyway, I have no way to gauge that, except by the engineers, and no engineers told me that the reason anything was done in this case had any rational basis to engineering. The fact of the matter is it had a basis for nothing but politics, and the evidence discloses that, and the uncontradicted evidence of the Plaintiff in this case was everybody knew that

what happened to my project was that the citizens around it didn't want it because it was too tall, and anybody that didn't know that didn't know anything about the project.

That's what the evidence shows. That's the only basis why the action was taken against these men and their permits.

If they had been able to persuade the National Capital Park and Planning Commission to revoke its approval on that basis, that would have been a different story. Those people over there steadfastly understood, by their opinion, and as far as I know, do to this day, at least the evidence in this case shows it. They were the ones who had to deal with the height, and they were the ones to whom that question should have been referred if, indeed, it was a question at all.

This mummery about contractor's licenses and airports and injunctions, and its totally unintelligible letter - at least to me - from Mr. Novak who, obviously, didn't write it, be-

cause he doesn't talk like that, neither did his superior, as I recall - I heard him testify in many cases. Somebody put that thing together and had them sign it.

In any event, it makes no sense. It makes no legal sense, and I am sure a legal person did it. That had nothing to do with the issue in this case with the airport.

The evidence clearly shows that Prince George's Office of Inspections and Permits didn't even enforce the height of buildings around airports, or wouldn't know where the regulations were or what it said, and obviously that was a consideration, the height question. When it was considered, once again, it should have been referred to the proper agency and not used as an excuse in this case.

Now, we don't perceive that there is any question about the Plaintiffs in this case exhausting their administrative remedies. It's argued that they should have appealed to the Board of Appeals. Well, appeals to the Board

of Appeals are from what you perceive to be an order that's wrong, or that somebody has no power to issue in connection with an inspection and permits thing.

If the building inspector said you are not pouring that footing, or you are not doing something else, that's the kind of thing you appeal to the Board of Appeals. What good does it do to appeal to the Board of Appeals from the Office of Law saying that your permit is invalid? The Board of Appeals doesn't decide whether permits are invalid or not. They simply decide whether the inspectors and officers of the Defendant are going in accordance with the regulations that they have to go by, or whatever else it is that they can decide.

Not this. The Defendants in this case had no requirement to do anything else except come into court and ask for an injunction to return their permit. The Board of Appeals certainly didn't have authority to order the WSSC to return these sewer permits, and we don't think

they had the authority to order the inspector to change his position on the law that this was no permit at all.

Now, Madam Clerk, will you find me the amended declaration or the original declaration of the original bill of compaint in this case.

THE DEPUTY CLERK: The original bill of complaint?

THE COURT: Yes. It's under the argument that what the Court has to do in this case, or ought to do, is balance the equity between the Sanitary Commission and, as I gather it, the developers, and to say, in effect, that the Sanitary Commission was doing what it could in a bad spot, and has a lot of problems with sewerage, and the developers have very small problems.

They spend a little bit of money, but nothing like the mess that the Sanitary Commission has to contend with with overflows and two small lines and inadequate sewage treatment

plants, and treatment plants that aren't located in the State of Maryland or within their territorial jurisdiction, and lines that have to be built across officers quarters on Government service bases and all, and that, therefore, we ought to decide that no matter what they did, they ought not to be held to account for it in this case.

We don't think that's right. We don't think that equities in this case required the Court to substitute its judgment for the judgment of the professionals at the National Capital Park and Planning Commission, for the judgments of the professional engineers at the Sanitary Commission, for the judgment of the professionals who make the inspections and review the applications for building permits in the Office of Inspections and Permits here in Prince George's County, all of whom the evidence in this case shows conducted themselves in an honorable, honest and diligent fashion until they received orders from somebody whom

they perceived politically had the power to give them those orders, and presumably the final responsibility for the action taken, if not determination for the basis upon which it was taken.

We don't perceive that the equities in this case ought to be balanced in such a way that this sort of political flimflammery ought to be upheld, and honest people trying to do things in accordance with the existing laws and regulations and within the framework of the professional people with whom they had to deal with for approval, ought to be left twisting in the wind.

I don't understand that that's the kind of equity that this Court ought to deal with. What I do perceive to be the problem in equity in this case is that equity regards as being done, and what ought to have been done in this case was the minutes of the Sanitary Commission's meeting of October the 25th should have reflected that this case was considered under

the unusual conditions provision of Resolution No. 72-053, and was approved by the full Commission for the issuance of sewer permit, and the Commission directed the permit to be processed and issued.

That is exactly what should have been done in this case, because it would have reflected accurately what the Commission did, in fact, do, and having done that, the Commission was not authorized to withdraw those permits after actions had been taken on them.

If any further evidence of the fact that this was done is needed, it can be found in the letter from the Commission staff to the developers reminding them of the fact that the permits had been issued, that they were a valuable thing, and that they had to be exercised within six months or they would be lost.

Now, all of this, gentlemen, leads us to the final question on some of the prayers in this case.

We concluded that the building permit in

this case was improperly revoked. It was a valid permit when it was issued. It was subterfuge, under which it was revoked, and there was no legal significance, no practical effect, no basis for that action, except as an excuse to stop a project which the Executive, at that time, had come to believe was politically unpopular with the people in the area. It was unpopular with the people in the area, and therefore, politically unprofitable to him.

The Court will, therefore, order that the building permit be returned to the builders forthwith. The Court finds that the Sanitary Commission, acting under the erroneous instructions of the Executive, attempted to revoke its permits.

Therefore, for the reasons stated herein, the Commission will be instructed to notify the builder forthwith that the efficacy of their permits heretofore issued is restored.

With respect to the claim against the intervening defendants in this case, we think

that the purpose of permitting them to intervene was simply to let them have their say about this matter. No evidence has been introduced which would tend to indicate that they ought to have to pay any judgment for damages, and they, of course, have no official standing to issue or refuse to issue anything.

And so, insofar as they are concerned at this point, they are dismissed from the case, subject only to the judgment against them individually for their proportionate share of the costs; that being one third of the court costs to be assessed by the clerk, and judgment entered against them jointly and severally, and individually for one third of the costs.

That brings us to the consideration of this question of damages from the point of view only of the laches.

Because we agreed that we were going to take damages as a separate matter of proof, there is not much point in going ahead with that unless we get past once again the question

of laches.

As a preliminary matter, we refused to throw out the Plaintiffs' claim for damages on the grounds of laches, because if the Court understands correctly, the principle of laches in equity parallels closely to the statute of limitations at law.

Now, the statute of limitations is a very precise thing. One day you have a cause of action which you can enforce at law, and the next day you are forever barred. While equity doesn't deal in exactly that precise period of time, it does, in general, follow the statute of limitations in the application of the doctrine of laches.

If we understand that doctrine correctly, it simply is if you don't enforce a right within a reasonable time, you just let it drift and sleep on it, don't apprise the other party that you are going to try to enforce it, you lose it.

You don't lose the right, but you lose the

ability to bring the aid of the equity court to the enforcement of the right.

Now, the resolution to that question in this case turns on whether or not the Court is going to take the position that Plaintiffs asserted their claim at the time they amended their declaration, because if we conclude that it was asserted at any time prior to that, we don't have any question of laches.

Clearly the suit was filed promptly, and no one can say that laches attaches if the date of filing suit, which was July the 2nd, 1973, within a few months after this project was stopped - if that date is accepted, nobody can argue that laches applies.

But the County does argue, and also the Commission, that it was three years and four months later after suit was filed that an amendment was offered asking for damages. We conclude, gentlemen, without deciding whether there are any recoverable damages in this case at this point, once again, that the evidence in

this case doesn't support a finding that these plaintiffs are guilty of laches.

They put the Defendants on notice, if any further notice was needed, that they were suffering financial loss. They filed a suit promptly in which they describe the money involved in their operation, and what they have already expended.

Now, possibly that's for two reasons. The principal thrust of that we think can support their contention that they have acquired a vested right to perceive, but in any event, they put the Defendants on notice that substantial sums of money were null.

I say, "If any further notice was needed," because every officer of each of the defendants who dealt with this project understood that it was an enormously expensive thing of considerable size and complexity, and all had to know how much money goes into the advance planning and preliminary work in connection with engineering, site planning, professional wit-

nesses, and all the other things that go into this type of project.

In any event, we think actual notice was given, and the filing of the suit in this case with the recitation of some of the money damages involved, and the prayer for such other and further relief, as the nature of their case may require, is sufficient to put the Defendants on notice that damages are claimed.

That prayer for further relief historically has empowered equity courts to give damages in cases where equity jurisdiction otherwise attaches on the theory that the equity court, having taken jurisdiction of those matters which are peculiar to its jurisdiction, can do complete justice between the parties by giving the judgment for money damages under the prayer for further relief, gentle prayer for further relief.

We think, therefore, that we do not reach the question of whether the amendment date is the date we ought to use, because in the view

the Court takes in the matter, based on the evidence presented and the documentation in the file, laches would not have run beyond the date when the original suit was filed.

Even, however, if that is incorrect, we think that the amended bill of complaint relates back to the original filed, and under the same line of reasoning which this exact same member of the court used in the Aragona versus Myers case, which was cited in argument, perceives that the amended bill of complaint states no new cause of action, or any different matters that were contained in the original bill of complaint, and therefore, is simply an elaboration of a claim or right asserted in the original declaration, and therefore, relates back to and tolls either the statute of limitation or the running of the doctrine of laches as of the date that the original suit was filed.

Now, what I am about to say does not change the oral opinion that I am giving. This

is for the guidance of counsel on the presentation of evidence at this point.

I do not mean to rule out on your argument of laches the fact that evidence - that period of delay, agreeable to all sides, is not admissible in mitigation of any damages that may be found.

What we are saying is that we don't agree with your argument that the claims are barred entirely by laches, but we do also not rule out your argument that the delay was occasioned by some other thing, other than the County or WSSC's action. That is a matter of mitigation which may reduce or mitigate the damages, but not bar them completely.

Once again, because they are raised in argument, we think the Court, in its final decision, must reaffirm its preliminary ruling that in this case the WSSC is, of course, a public body, and as such, it partakes in the sovereign immunity of the State. It is a creature of the State, and partakes in the

sovereign immunity of the State when engaged in the business of the sovereign.

As we recollect from the previous arguments in this matter, and the previous ruling of the Court, it might be simpler just to say that we, once again, adopt the reasoning expressed by the Court at that time, and the opinion expressed by the Court at that time which was, if I can remember correctly, in the planning, construction and extension of sewer lines, pumping stations, plants and so on, the Commission is exercising one of the police powers of the State, and therefore, partakes in the sovereign immunity of the State, as far as its actions in those areas are concerned.

With respect to the daily service of sewers, the hooking up of sewer lines, the permits that deal with the hooking of buildings to existing lines, those are proprietary functions, and as to them, the Commission does not enjoy the defense of sovereign immunity, and in those functions and suits and claims

arising out of and relating to them, it can be sued and it does not have available the defense of sovereign immunity.

The Court finding that as a fact, that those are proprietary as opposed to governmental functions.

Now, gentlemen, I tried to cover, as best my memory serves, and the cramped quarters in which we are operating, all those matters which I believe are significant, and which were advanced in argument, or which represent the position of one side or another.

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

[dated January 4, 1979]

HERSCHEL BLUMBERG, et al.	*	
v.	*	Equity No. D7901
PRINCE GEORGE'S COUNTY, MARYLAND, et al.	*	

ORAL OPINION

THE COURT: Gentlemen, I have looked in vain - and when I say gentlemen, I mean no offense to you, Mrs. Sears. You think like a man, argue like a man, that is a compliment from me. However, I do not mean to imply that anybody would mistake you for anything but a lady.

I have looked in vain for a transcript of which I said the last go round back in the Spring, but I assume that you all have it.

MR. D'APPOLITO: I can get you one.

THE COURT: It would clearly reflect that

the Court concluded at that time that an improper action was taken in this case, and that the building permit should be reissued, the sewer and water permit should be reissued without any further application being necessary, and that the costs of those matters previously paid should stand or additional costs reduced to the level that they would be at that time. That is my recollection of what I said, and if the written page does not reflect that, we are going to conform it to do so.

What is left to be decided, in addition to those matters which we already clarified to some extent yesterday in the comments before Mr. Sisson left, does not directly concern the Sanitary Commission because as a matter of law, they cannot be held liable for money damages in this matter. It is with the question of money damages that this second portion of the trial in this case has concerned itself.

The County through Mr. D'Appolito has argued, and we think very ably, that the judg-

ment in this case ought to be limited to the present limitation found in the Charter. We believe that a limitation of that sort, if applied in the fashion which is urged it be applied in this case, would constitute an ex post facto action or transgress the ex post facto prohibition in our basic constitutions. A limitation of liability in this situation we think ought to be the limitation in effect at the time the occurrence took place which gives rise to the assessment of damages and not a limitation arising out of a subsequently enacted law.

With respect to the validity of a waiver, which was raised in the final argument, we think that the waiver in the Prince George's County Charter has always been held, at least by this member of the Court, to be a valid waiver of sovereign immunity, and we do not believe that anything other than the Charter is necessary to enable that waiver to be effective. If there is a case or a holding of some

court of last resort to the contrary, we have not seen it.

With respect to the third position argued that the County could not give a building permi at the crucial period, which was the first six months of 1973, without water and sewer permits, the evidence in this case shows that the water and sewer permits were issued, the County building permit was issued, and we have here a question of improper revocation of a permit. It is that which gave rise to this problem.

My notes reflect that the evidence shows from the preceding trial session of this case that the County revoked its permit, and based upon that, the Sanitary Commission revoked theirs. It was sort of an after you Alphonse, no after you Gaston sort of a situation, but if the County is Gaston in that series, he went first finally, and it is from that action that the subsequent problems stem because that was the excuse which the Sanitary Commission used

for calling in its permits.

The next proposition which we consider is whether the County is liable for this action because it was ultra vires. The action certainly wasn't ultra vires as to the Sanitary Commission, nor was the action ultra vires as far as the County is concerned, if you define that term to mean that it is an action which is beyond the Charter powers or the legal powers of the County to take.

What we find to be the fact in this case is that the action was wrongful. It was an improper action because it was a concert of two governmental bodies, each acting as they had a power to act and within the powers that were granted to them, and had the actions been taken upon the basis of sound discretion or correct public action, there would have been nothing really wrong with what was done. What makes it wrong is that they were acting in concert improperly and for a motive other than one which they had a proper right to consider in this

case.

Neither of the actions were ultra vires in the sense that the Court understands that term to apply to an action absolutely beyond the Charter powers of a corporation or body politic to take. An illustration of the type action we think fits the ultra vires pattern is a building corporation such as Spruell Corporation issuing a bond to Suburban Trust Company to guarantee the construction of a building bonding construction as some lenders require. Spruell Corporation, being a builder or a land development and ownership corporation, has no power to write bonds, and to write one is ultra vires. It is beyond their charter and it is against the law.

If you define ultra vires in that sense, and that is the way we think it must be defined, the action was not ultra vires. If you take it from the position, as argued, that the officer had no power to commit the corporation to the act, then it is ultra vires because the

officer's motive in taking the action was improper.

There is no doubt in this case that Gullett's motive in doing what he did in this case was highly irregular, improper and just plain wrong. He was not acting in any other purpose than what he thought would get him one or two more votes at the next election. That is a wrong motive when it results in a combination such as this that costs people money and disrupts and destroys the confidence that people ought to have in their government.

The fact that I say it was wrong from the Court's point of view - I meaning the Court thinks it is wrong - doesn't make it ultra vires in that sense because I suppose a politician feels that the first duty he owes is to get re-elected because if he does not get re-elected, he cannot do anything for us in that office. He may have thought that was a highly proper thing to do. I doubt it but he might have.

In any event, actions politically motivated which are wrong but which are within the power of the body of which the political officer is a part to take are not ultra vires in the sense that they become void and, therefore, cannot be used as a basis for liability on that body if it is liable and the action turns out to be a tort. We do not believe that the evidence in this case shows that these actions were ultra vires either on the part of the County or the Sanitary Commission.

With respect to laches and the suspending of Rule 530 and limitations, we have dealt with those matters previously in rulings on various motions, but we simply say here that the filing of suit tolls limitations with respect to the suspending of Rule 530. We do not believe it was suspended after the rule was changed to prohibit its suspension unless good cause is affirmatively shown on the record. In any event, we think the rule was each time suspended because everybody was taking action in

the case in the hopes of resolving it, if not taking action to bring it to a head in the way which it finally was by trial.

Simply stated, we think that laches has not run since the case was filed, although we agree with the principle of the law that it might on items or elements of damage, and that certainly delay is to be taken into account in mitigation of damages which increase with mere passage of time. We agree with the County's position that that mitigation ought to be allowed which is attributable to the fact that everybody was willing to negotiate. However, as a matter of law, we do not think either of those principles defeats the recovery in this case.

With respect to the next contention of the County that damages are purely speculative, we say that there are some damages in this case which are susceptible of exact mathematical calculation, an example of which is those items for which money was expended by the plaintiffs

for materials, labor and supplies which had no direct income producing ability and which are lost forever insofar as being of any value to the project in the future. Those are susceptible of direct mathematical calculation.

There are some damages which are susceptible of interpretation and calculation, but when you say that damages are totally speculative, that is not the situation here. These damages are damages about which reasonable men may differ forever and never be convinced, and they are not the kind that are in total readily apparent nor necessarily easily calculated or discovered. That does not mean that they are not real or that they cannot be calculated or discovered and that it cannot be absolutely demonstrated that they occurred.

We say in passing about the damages that there is absolutely no way that this Court can put these plaintiffs in the position they would have been in if these permits had not been pulled. We just simply cannot calculate the

damages to that extent nor determine them to that finality because nobody can say exactly how much they are. When you are talking about this much money, there is just no way to tell what their damages have been, but to some extent we can say what they absolutely had to be, and to that extent, we propose to try to make them whole.

The next argument advanced is that the Sanitary Commission's acts were not the responsibility of the County, and since the Sanitary Commission is gone, the County ought not be left to bear the damages. We think that is true. The Sanitary Commission's acts, except to the extent that they acted in concert with the County at the County's instigation, are not the responsibility of the County.

However, when two persons' or corporations' actions combine to harm the plaintiff, it is not necessary for the plaintiff to be able to recover against everybody. When joint wrongs are committed, the plaintiff may recover

his total loss from either of the joint tort-feasors, and it is up to them to recover among themselves on a theory of contribution.

In this case when you look to that theory, you come to a dead end because you are not able to reach them for contribution, and I suppose to that extent it is sort of like making your left hand contribute to your right hand anyway. In any event, that does not defeat the plaintiffs' recovery against the person who is liable because there is another tort-feasor who either cannot pay the judgment or cannot be reached.

With respect to the position that the plaintiffs failed to exhaust their administrative remedies because they did not appeal the revocation of these permits to the Board of Appeals, we think that if all that were involved here was a question of whether or not these permits could or should be granted, that might be true. I suppose the Court could well say that you have to go the limit of the admini-

strative machinery before you bring to the Court the question of whether the zoning inspector or the Office of Inspections and Permits did what it was supposed to do, but there is more involved in this than a question of whether or not the zoning inspector did something in accordance with the zoning law or the Office of Inspections and Permits issued a permit in accordance with the requirements of the law governing permits.

What is involved in this case is an alleged conspiracy now proven, and a question of substantial damages. Under these conditions we think that the further pursuit of this matter in the administrative area would have been totally fruitless, and that the plaintiffs were entitled to go directly to the court where they could have the action viewed as well as seek the damages which even at that stage they foresaw they were going to sustain. The Court feels that it can exercise jurisdiction in this case, notwithstanding the fact that the final

administrative steps were not taken.

The fact that the agencies acted on legal advice would not be a defense, we think, to this sort of action although it is sometimes a defense to tortious conduct. However, in order for legal advice to be a defense to tortious conduct, even in those cases where it is a defense, the evidence must affirmatively show that the person seeking the legal advice fairly and fully and completely informed the attorney giving the advice of all facts and circumstances and conditions relevant to the legal opinion which was finally given.

The evidence in this case falls far short of showing that. In fact, it shows just the opposite of that. What it shows is that the person who is going to make the decision said, "I have made up my mind to do this. Find me the most plausible legal excuse for doing it that you can come up with on short notice." I do not think that would be a defense, although this is not the type of action to which legal

advice is a defense anyway.

The final position raised by the County is that the evidence does not state a cause of action against Prince George's County. We think we have summarized that evidence in the previous opinion of the Court and found that it did state a cause of action against Prince George's County.

The fact that damages cannot be allocated between the County and the Sanitary Commission we think is sort of a corollary to the ninth proposition of the County, and we rule on it the same way. The fact that it cannot be allocated does not prevent the Court from allowing damages.

In this case we think the damages can almost totally be attributed directly to the improper action of the County, and the Sanitary Commission would come out on the small end of the allocation anyway since their action was taken in direct response to the improper action of the County, and really may have been in

their view proper. We never did reach that position because they left early.

They left before the damages part came along, but we are inclined to say that had the Court been put to that question on the facts in this case with respect to damages, we think that we would have allowed very small, if any, damages against the Commission because they were acting to some extent under what they perceived to be the duress of their financial relationship to the County and on the instigation and at the insistence of the County Executive.

We think that even if there were a question of allocating the damages, the allocation which this Court would have made, had it been doing the allocating, would have been very small insofar as the Commission is concerned. As a matter of fact, we think probably that we have done all in their direction that would have resulted anyway when we required them to issue the permits and the hookups at the old price. I think that effectively deals with

their contribution to the problems.

Finally, the County argues two propositions that there are no damages due on loss of earnings on the model apartment, and that we do not have the proper party to this action.

The answer is to the last question we think that whether these men were going to form a corporation or a partnership or some other business entity or recognized type business organization is not of any significance to this case. Had the action been brought in the name of some paper corporation and the real parties in interest been obscured, that might be another matter. But here whether it was a partnership, individual proprietorship, joint venture, corporation or whatever it finally was going to be, probably was outgrowth or would have been an outgrowth of the current tax advice and really had no significance with respect to the real properties in interest.

The real parties in interest in this case are the plaintiffs in this case. Whatever they

would have done, it is pretty clear they did not intend to give this property away. Short of giving it away, whatever organization they allowed themselves to form or caused their attorneys to form for them would have in fact been their property, just as much as though the land and the building is their property now.

I think we do not have any want of proper parties or lack of necessary parties, and we think that the question of the loss of earnings on the model apartment as an element of damage is susceptible of determination on that very same basis. Here you have once again left hand/right hand proposition of the same person. Certainly the left hand can excuse the right hand from making payments, but if the left hand excuses the right hand from making the payments and nobody comes forward with an outside hand to make them, the body has lost the payment.

That is exactly what happened in this case. They had caused one of their corporations to put aside area to devote to this project.

The fact that it did so and was not able to earn money on that area was a loss to them.

For their own purposes and fiscal integrity, as Mr. Totah testified, they do not just put things down on paper and write them off because it is involved with one of their projects. Each of their corporations they deal with as an arm's-length proposition between themselves because if they do not, then their books and records and accounts receivable and accounts payable and balance sheet and financial material do not mean anything to banks or anybody else who looks at them. This is important to them, and for that reason, they do it that way.

That really is not important to the Court. What is important to the Court is that the money was lost because the property was committed to this project, albeit by another organization totally controlled by the plaintiffs, and we think it is an allowable item and, accordingly, did allow it in the calcula-

tion of the moneys lost which could not be recaptured.

That brings us down to final recapitulation of damages. We think that the plaintiffs in this case are entitled to damages. The question then becomes how much and for what. I said this before and calculated this before on the record, but I guess it will not hurt to go back over it again.

There is an exhibit in this case which sets out the actual amounts of money which were spent by the plaintiffs and lists what are and are not recoverable expenditures. When you take the total outlay, as we indicated from time to time, which was architectural fees, payments to subcontractors that are not recoverable, interest payments were disallowed, rental for model apartments and model apartments construction and demolition, those things have no more value to this project. They were put up, lost and gone.

When you take the total of those figures,

you get $612,761.46. Included in that were interest payments which in that calculation we disallowed, and that brings us to the figure of $373,919.

Nobody can seriously contend, we think, that that much money which they got from somewhere, the plaintiffs have not lost thus far in this project. We allow that as an item of damage.

When you leave that point, you get into some really substantial figures. I said before that I do not suppose there is any way to actually calculate what has been lost by the petitioners because this project was held up. Nobody can really say how that all would have gone. This is the Court's philosophy on damages. This is the way we approach these damages.

We think we have to give them an amount which is absolutely susceptible of concrete calculation, giving the County the benefit of any doubt in that calculation because the

County in this case is not the ordinary kind of defendant. It is all of us, including the plaintiffs. It is everybody's taxes, and we want to be sure that in the calculation of damages they get the benefit of the doubt.

This may seem like a bad way to do it from the individual plaintiff's point of view, but we just don't see any other way to do it. It is not a matter of just what is a fair preponderance of the evidence. It is a matter of the way in which you approach the calculation of damages.

This much is self-evident: The plaintiffs still have their land. They now have their building permits. I do not know whether they are going to build this building, but as long as I sit on this bench, I am going to be sure that they get those building permits and sewer permits, and I reckon I have got about 29 more years, according to my calculations, if I don't get run over by a truck. I don't know what will happen to them if I get run over by a

truck going home, but if they can build it in 29 years, I am going to see that the government gives them what they need to build it in the way of permits.

They can build the building. They can get the money. They can sell it once they get it built. The evidence in this case shows that beyond any question these men did not have to worry about borrowing money. They were going to get their loan. They had done what was necessary, and they were ready to go and were in fact pouring concrete to build the building, so there isn't any question that they were going ahead with this project.

There was some question as to exactly what kind of project it was going to be, but a lot of that was generated by this finagling of the County with the permits and how tall the buildings were going to be. When you say it is speculative whether they were going to build a project or not, that is not borne out by the evidence in this case.

The evidence shows they had poured an enormous amount of concrete which had brought the building out of the ground, and they were on their way up with it, so they were going to build it, had the wherewithal to build it, and the Court has no problem about that. They can still do that so they have not lost their anticipated profit for good. They can still make a profit.

The fact that it will cost them more to build the building does not mean that they have lost the difference of nine million dollars. What it means is that when they sell the condominiums or rent the apartments, they are going to have to rent them for more money or sell them for more money, but that isn't really a loss to them either because the market is going up to reflect that increased cost of everything. Although they could have sold the apartment for $28,000 or rented it for $250 a month had they built it then, they can now sell it for $29,000 or rent it for $275 because the

increase in their costs is a function of the increase in the cost of doing business world-wide, countywide, area-wide, region-wide, and they can still maintain their relative position almost.

The almost we think arises out of the fact that whether they use Suburban Trust's money to build this project or whether they use their own money to build this project, that capital which is necessary to build it has value. It has a value which is susceptible of exact or very nearly exact determination because if they use their own money to build it, they have lost the income producing power of that money for as long as they have got it tied up in that project, and if they borrow the money to do it, they have to pay for the value of that capital for that period of time.

We do not allow, as we said before, as an element of damage interest on money you have to borrow to do something because the law about interest I think is still back in the fifteenth

century, or whenever they didn't charge interest, and has yet to come into the twentieth century. We think the law of damages on interest allowances is way behind.

We use the interest figures which were admitted in evidence not as an element of damage of interest per se but as an indication or a calculation of the value of capital to this project, whether it comes from the petitioner's pockets or from borrowed sources.

The question is how do you arrive at that figure, and we think that the evidence in this case demonstrates that the increased cost of that item which has to come out of their eventual pocket is somewhere within the range of the spread of interest which is calculated, and that figure was somewhere between $1,308,175 and $2,083,347. The Court taking a modest side of that thinks that the figure which ought to be used is $1,500,000.

That calculation is made in the plaintiffs' damages item in the rental project cal-

culation. We think it is equally applicable to either one because the costs of the project do not vary. The calculations of the building do not vary depending upon how you do that. That is the value which they have lost because the capital would have been that much less expensive had this project gone up, and we think that it is a direct function of the ultimate value of the project to the petitioners, so we are prepared to allow that as an element of damage.

In addition to those two items, what else do we absolutely know beyond a doubt has been lost in this project? The answer is what else has been lost is time. If you take the position that the Court takes on this, it is that by the gentlest estimate of time lost which we can make, the action of the County absolutely had to delay this project by at least three years. Even if this case had been brought to trial promptly, there would have been further appeals and so on.

We do not think that the County ought to bear the entire responsibility for all the delay because we are all business wise to some extent and worldly wise to some extent, and there was an attempt on the part of the petitioners here to negotiate it with everybody, and business conditions did change in the area, and doubtless all these things go into the making up of the negotiations, and the fact that the case wasn't pushed perhaps by the plaintiffs as hard as it could have been and certainly wasn't pushed by the other side at all.

There is no reason why they should really accept that. Once they knew their foot was in the molasses, we think they have an absolute responsibility also to move the case forward because, as is apparent to everybody, damages were running and some problem was being caused.

We conclude that because of this action, the petitioners were robbed of their opportunity to make a profit and invest that profit or use it for further earnings. Therefore, the

profit itself they can still make. The evidence clearly demonstrates that they can still make this building and make the profit. It is going to be narrowed by the increased cost of capital, and we have made allowance for that in the second element of damages allowed, but there is no way that they can now make up the time that they have lost. That once lost is gone forever.

Next is their ability to reinvest that capital, and here is one of those places where I say there is no way that anybody can tell how much they lost on the top side because these men are young and in business and successful, and to take a million dollars, as someone not familiar with what they do or able to do what they would have to do, and invest it in certificates of deposit or something is not what they would do I suppose. At least they can take that million dollars and with their time and effort and expertise make a lot more than nine percent return on it. This project demon-

strates that very principle.

Assuming they had been able to make the profit and get it out, or a large part of it out, of this project, they would have then had the opportunity to reinvest it and develop another project, and just as a storekeeper makes money by turning over his stock and trade, so they could have had the opportunity to make their profits in this case earn money for them or increase their position in other cases.

Be that as it may, there is no way that we can do that. That is speculative because it involves a question of what would they do and how would they do it and so on which is not in evidence in this case. What is in evidence in this case is that they were going to make and beyond any question of a doubt would have made a profit on the transaction which they were engaged in when these permits were lifted or revoked.

In dealing with the evidence in this

matter, we think that the stature and reputation of the Booz, Allen people and their counterparts is such that the Court is justified in relying on them in reaching the conclusion that the project would have been economically feasible as a condominium project and would have resulted in a product which was salable in the marketplace. That it may have sold out at a lesser rate than they predicted or the developers hoped is a possibility, and one cannot always guarantee that what one's pencil shows as a profit is eventually going to be the profit.

However, when calculations are made by people who have demonstrated accuracy, expertise and ability in this field, we think they become evidence, and the opinions of those people are persuasive to the Court. We have no difficulty concluding that this project would have made a profit.

We are not prepared to say that we will allow as damages the interest on that profit

for the entire length of time because we think it has to be reduced, number one, because part of the time we do not charge to the County, and number two, because we are not sure that these men really felt that seven million dollars would be the exact profit they would make. We think there is enough evidence in this case indicating that there would have been a longer period of time for the selling of the property than they had perhaps hoped and Booz, Allen had predicted.

We are not even sure that it would have gone that way, but whether one is a condominium or is a rental project, we think there would have been beyond any question a substantial profit. If we take as an arbitrary figure half of the amount calculated, I think we can be on the absolute safe side. We, therefore, are prepared to allow that and would diminish it in part because of the evidence dealing with the market conditions in the latter part of the sales period when these last properties would

either have to have been sold or rented, and partly because the County we don't think is responsible for all the delay up to the time this case started to be really tried, which was last May, and partly because we want to be absolutely fair about the matter with the County.

We, therefore, conclude that as an element of interest or earnings lost, we have accepted a figure of $3,600,000 as the interest which by any stretch of the imagination could have been earned even if we diminished the whole business more than half. We come up with a final figure of $1,800,000 for lost earning capacity on the money.

We have no way of knowing exactly what the total losses were to be, but we have reviewed the evidence submitted by the plaintiffs on the increase in cost of construction and increase in cost of borrowing money as well as the profit and interest foregone on the property, and we conclude that we are prepared to direct a judgment be entered in this case in favor of

the petitioners against the County for the sum of $3,673,919 which is broken down into $373,919 for money spent, not recoverable; the value of the capital to them which is increased cost or value because of the passage of time $1,500,000; interest on the absolute minimum profit which the evidence shows to the Court's satisfaction could have been made of $1,800,000 for the period of time which we think the County was responsible for the delay in the project for a total of $3,673,919.

Madam Clerk, you will enter that as a judgment and receive a written order to do so with interest from date and costs of this case.

Gentlemen, you will give me a written order encompassing everything that is finally decided in this case, and I will sign it as soon as I receive it.

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

HERSCHEL BLUMBERG, et al.,	*	
Plaintiffs,	*	
vs.	*	Equity No. D-7901
WILLIAM W. GULLETT, et al.,	*	
Defendants.	*	

INJUNCTION, DECLARATION AND DECREE

This case having come on for hearing, evidence having been taken in open Court, counsel having been heard, it is this 30th day of January, 1979, by the Circuit Court for Prince George's County, Maryland, sitting in Equity, and in conformance with its previous oral Opinions,

ORDERED AND DECREED that Prince George's County reissue Building Permit No. 1597-72-CG to the plaintiffs. This building permit is dated March 13, 1973, and is further identified as that permit which was revised by Prince

George's County by merging Building Permit No. 1597-72-CG issued to plaintiffs on January 25, 1973 and Building Permit No. 1598-72-CG issued to plaintiffs on February 23, 1973; and it is further,

ORDERED AND DECREED that the WSSC reissue Plumbing Permit Nos. 381286 and 381287 to plaintiffs for the Plaza Towers apartment building, said permits originally issued to plaintiffs by the WSSC on November 10, 1972, and revoked by said defendant on May 30, 1973; and it is further

ORDERED AND DECREED that defendants, Clark M. Bressler, Julia O. Bressler, James B. Maddox and the Zoning Coordinating Committee, are dismissed from this action, subject to the payment by said defendants of their share of the costs of this proceeding; and it is further,

ORDERED AND DECREED that the motion of the WSSC to reconsider the WSSC's Motion Raising Preliminary Objections to plaintiffs' Amended

Bill of Complaint as to the issue of the application of governmental immunity to the WSSC is granted; and it is further,

ORDERED AND DECREED that the WSSC's Motion Raising Preliminary Objection as it asserts the defense of governmental immunity to plaintiffs' claim for compensatory damages is granted, subject to the payment by said defendant of its share of the costs of this proceeding; and it is further,

ORDERED AND DECREED that Winfield M. Kelly, Jr., and William W. Gullett are dismissed from this action; and it is further,

ORDERED AND DECREED that judgment be entered against defendant Prince George's County in the amount of Three Million, Six Hundred Seventy-Three Thousand, Nine Hundred Nineteen Dollars ($3,673,919.00) current money with interest from this date plus its share of the costs of this proceeding; and it is further,

ORDERED AND DECREED that defendants shall pay all costs.

/s/
Judge Perry J. Bowen

PRINCE GEORGE'S COUNTY, MARYLAND, et al.	*	In The
	*	Court of Appeals
v.	*	of Maryland
HERSCHEL BLUMBERG, et al.	*	No. 147
		September Term, 1979

* * * * * * * *

M A N D A T E

TO THE HONORABLE THE JUDGES OF THE COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS, the case of Prince George's County, Maryland et al. v. Herschel Blumberg et al. came before you and wherein the judgment of the said Court of Special Appeals of Maryland was duly entered on the seventh day of November, 1979 as appears from the transcript of the record of the said Court of Special Appeals of Maryland which was brought into the Court of Appeals of Maryland by virtue of a writ of certiorari dated January 25, 1980; and

WHEREAS in the September Term, 1979 the said cause came on to be heard before the Court

of Appeals of Maryland;

ON CONSIDERATION WHEREOF, it was ordered and adjudged on August 22, 1980 by this Court that the judgment of the Court of Special Appeals as it pertains to Prince George's County and the Washington Suburban Sanitary Commission be reversed and case remanded to that court with instructions to reverse the judgment entered in the Circuit Court for Prince George's County against those two defendants without a new trial. Judgment of the Court of Special Appeals as to William W. Gullett and Winfield M. Kelley, Jr., affirmed. Costs to be paid by Marvin and Herschel Blumberg.

NOW, THEREFORE, THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause in conformity with the judgment of this Court above stated as accord with right and justice, and the Constitution and laws of Maryland, the said writ notwithstanding.

WITNESS the Honorable Robert C. Murphy,

Chief Judge of the Court of Appeals of Maryland

this third day of October, 1980.

/s/
Clerk, Court of Appeals
of Maryland

Costs:

Petition filing fee (P.G. Co.)	$ 20.00
Petition filing fee (Blumberg)	20.00
Petition filing fee (WSSC)	20.00
Appellant's brief (P.G. Co.)	264.40
Appellant's brief (WSSC)	Negligible
Reply Brief (WSSC)	Negligible
Appellee's brief (Blumberg, cross ant)	251.24
Appellee's brief (Blumberg, ees)	215.88
Reply Brief & Appendix (Blumberg)	191.10
Joint Record Extract	178.64
Motion for Reconsideration	10.00

September 19, 1980: Motion for reconsideration filed by appellees.
September 26, 1980: Above motion denied.

IN THE

COURT OF APPEALS OF MARYLAND

PRINCE GEORGE'S COUNTY, MARYLAND, et al.	*	
Appellants and Cross-Appellees	*	September Term, 1979
v.	*	
HERSCHEL BLUMBERG, et al.	*	No. 147
Appellees and Cross-Appellants	*	

MOTION FOR RECONSIDERATION BY
HERSCHEL BLUMBERG AND MARVIN BLUMBERG

Herschel Blumberg and Marvin Blumberg ("Blumbergs"), by their attorneys, Linowes and Blocher, move pursuant to Maryland Rule 850, that this Court reconsider its decisions, as discussed below, in the above-captioned case, the Opinion of the Court having been filed on August 22, 1980. As grounds for their motion, the Blumbergs state as follows:

1. The actions of Prince George's

County are not reviewable by the Board of Appeals. This Court finds that an administrative remedy existed with regard to the actions of Prince George's County ("County") in this case and that the existence of this remedy deprived the trial court of jurisdiction. As a result, this Court has dismissed the case against the County. The Court's holding regarding the existence of an administrative remedy rests on its determination that § 4-140 of the Prince George's County Code (1975),[1] providing for appeals to the Board of Appeals ("Board"), does not limit the jurisdiction of the Board, as contended by the Blumbergs, to appeals from decisions of the Building Official refusing to grant a modification of a requirement of the Basic Code or Subtitle 4 of the County Code ("Buildings Chapter"). This Court finds that the second sentence of § 4-140: "[a]pplication

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[1]Cites are to the most recent (1975) Prince George's County Code, unless a material change since 1972 has occurred.

for appeal may be made when it is claimed that the true intent of the Basic Code or of this Ordinance has been incorrectly interpreted or applied", permits appeals by an aggrieved party from all decisions of the Building Official with regard to building permits, including not only refusals to modify the Basic Code or Buildings Chapter, but also, issuance, revocation, suspension, and amendment of a building permit.

This Court should reconsider this finding since a review of relevant statutory provisions demonstrates that the jurisdiction of the Board is limited by § 4-140 of the County Code to expressly exclude actions of the Building Official with regard to the issuance, renewal, denial, revocation, suspension and annullment of a building permit. This exclusion is found in the plain meaning of the language of (i) Article 25A, § 5(U), Maryland Code (1957, 1973 Repl. Vol., 1979 Cum. Supp.), providing authority to chartered counties to

create a board of appeals and to specify by local law the review power of said board, (ii) § 2-111 of the Prince George's County Code, 1975, creating a board of appeals, and (iii) § 4-140 of the Prince George's County Code, 1975, specifying the matters which the Board can review on appeal.

Section 4-140 of the County Code specifies only refusal of the Building Official to grant a "modification" to the express exclusion of "issuance", "denial", "revocation" and all of the other specific actions referenced in Article 25A, § 5(U) as matters for which review by a board of appeals may be provided by specific local law. The enumeration of only one of the permitted matters, to the exclusion of the rest, demonstrates that it is the intention of the legislature by § 4-140 to limit the appeals to the Board permitted by this provision to strictly a refusal of the Building Official to modify the Basic Code and Buildings Chapter and not, as the Court found, to permit an appeal to

the Board from a stop work order or a declaration that a building permit, once issued, is null and void.

2. If, in the alternative, administrative review of the actions of the County and WSSC were available to the Blumbergs, they were not exclusive and the trial court did not err in exercising jurisdiction in this case and issuing declaratory relief. The County did not raise the defense of exhaustion of administrative remedies until the close of the Blumbergs' case. At no time did the WSSC raise the exhaustion doctrine. Thus, the application of the doctrine must be determined based on the evidentiary record made. Based on the record, not only had the Blumbergs established facts entitling them to the declaratory and injunctive relief prayed with regard to the permits, but also, facts entitling them to receive damages in tort. The Blumbergs' tort claims are independent from the issue of whether their permits should be restored. To recover damages

in tort, the Blumbergs are not required to exhaust administrative remedies but only to establish that there has been tortious interference with their property rights, a civil conspiracy, and/or a taking of private property without compensation.

The Board of Appeals has no ability to render a binding judgment or to award damages. Tort claims such as the Blumbergs' are cognizable in the trial court as an original matter. If the reasoning of this Court with regard to the availability of administrative remedies is accepted, then the case also raises issues, through its claims for declaratory relief, which relate to a subject matter falling within the special expertise of an administrative agency. However, since the tort claims presented in this case are concerning which the trial court has jurisdiction, even if it is assumed that administrative remedies existed to review the question of restoration of the permits, jurisdiction to issue declaratory relief

and to restore the permits is shared in this case between the Board of Appeals and trial court. Thus, the trial court properly awarded declaratory relief pursuant to Courts and Judicial Proceedings Article, § 3-409(c), Maryland Code (1980 Repl. Vol.), wherein it is stated:

> "A party may obtain a declaratory judgment or decree notwithstanding a concurrent common law, equitable, or extraordinary legal remedy, whether or not recognized or regulated by statute." (Emphasis supplied)

Again, assuming for the sake of argument that this Court maintains its position that, under the facts of this case, administrative remedies existed to review the questions raised concerning the restoration of the Blumbergs' permits and that these remedies were exclusive with no exception to the doctrine applicable, this Court erred in dismissing the tort claims against the WSSC and County. Despite the power of the trial court to restore the permits, the trial court had original jurisdiction of the tort claims presented and these claims must not be dismissed on the basis

of the exhaustion doctrine. To do so is to deny the Blumbergs access to the courts to assert their tort claims and to thereby deprive the Blumbergs of (1) property without due process of law in violation of the Fourteenth Amendment to the Constitution and Article 23 of the Maryland Declaration of Rights, and (2) a remedy for an injury done to them in violation of Article 19 of the Maryland Declaration of Rights. Thus, if this Court maintains its position that the trial court lacked jurisdiction to reissue the permits because certain administrative remedies existed, it is the Blumbergs' constitutional right under both the Federal and State Constitutions to pursue their cause of action in tort for damages against the WSSC and County. Therefore, in the alternative, this Court must pass upon the merits of the tort claims presented and not dismiss this aspect of the case for failure to exhaust administrative remedies.

Stated differently, this case raises

two primary issues: (1) return of the permits, and (2) tortious conduct of Prince George's County and the WSSC. This Court has ruled only with regard to the first issue, return of the permits. The Blumbergs asserted tort claims seeking damages and were awarded damages based on said claims. These claims and damage awards are not contingent on the return of the permits. At any time during the course of this litigation, the Blumbergs could have abandoned their request for the restoration of the permits and simply pursued damages. If this Court maintains its position as to the application of the exhaustion of administrative remedies, then the Blumbergs cannot obtain their permits but they can still receive damages for the torts committed by the County and WSSC. This Court has not ruled in this aspect of the appeal and must, under constitutional mandate, do so.

3. This Court should not have concluded that, assuming administrative review of the

actions of the County and WSSC exist by statute, these remedies are adequate. The Court concludes that although the Board of Appeals has no jurisdiction to review the actions of the WSSC, this did not make an appeal to the Board inadequate, or excuse its use. This is so since the Court finds that the Board has authority pursuant to § 4-141 of the County Code to vary the application of the Prince George's County Code when justice would result. Thus, it is concluded that the Board could have ordered the restoration of the Blumbergs' building permit despite the revocation of the sewer and water permit contrary to the Buildings Chapter which required a sewer permit to issue prior to the issuance of a building permit. See § 4-230, Prince George's County Code.

Assuming for the sake of argument that this is a completely correct interpretation of the Board's authority, the Board clearly does not have authority to modify the provisions of any public general law. Article

43, Section 387C(d)3, Maryland Code (1957, 1980 Repl. Vol.), prohibits any local authority empowered to grant building permits to do so when existing facilities are inadequate to serve the proposed development. Since the Board has no jurisdiction to challenge a finding of inadequacy of sewer service made by the WSSC, public general law prohibits the Board from issuing a building permit when a sewer permit has been revoked for the reasons stated by the WSSC in the instant case, and the Board has no authority to modify a requirement of a public general law through the application of a local law.

In addition, this Court has incorrectly concluded that, if it is assumed that administrative remedies existed, they were available and adequate and, therefore, the exception to the exhaustion doctrine which exists when an administrative remedy is not available or adequate is not applicable. Poe v. Baltimore, 241 Md. 303, 308-309, 216 A.2d 707, 709 (1966). The patent injury to the Blumbergs

which results from this Court's finding that the declared administrative remedies were available and adequate belie the validity of the existence of this exception. If this case does not present a situation where administrative remedies, if found to exist, are not effective, then there is no case where such a finding can be made. Here is a situation in which the law prohibited the grant of a building permit if a sewer and water permit had not been issued. At a time when strict moratoria existed throughout the Washington Suburban Sanitary District, there is no reason to believe that the Board of Appeals would have the authority to circumvent the findings of the WSSC that sewer service was not adequate to serve the Blumbergs' project.

Even if it is assumed that the building permit could have been issued by the Board irregardless of County and State prohibitions against it, the permit would be entirely worthless. The building could not be built without

a sewer and water permit. This Court has concluded that an administrative remedy is not inadequate so as to authorize judicial intervention before exhaustion "because it is attended with delay, expense, annoyance, or even some hardship." (Opinion, p. 24) The facts of this case as found by both the trial court and Court of Special Appeals as they relate to administrative remedies create a situation which goes far beyond mere inconvenience, annoyance, or some hardship if administrative remedies are followed. Actual malice has been found on the part of William Gullett, County Executive of Prince George's County, with regard to his actions in stopping the Blumbergs' project. The sewer and water permit was not revoked because of any "mistake" by the WSSC concerning the applications of its own resolutions; the sewer and water permit was not revoked because of any inadequacy of treatment capacity; the sewer and water permit was revoked because William Gullett instructed the WSSC to revoke

it and the WSSC acquiesced in this improper, illegal and malicious action. The building permit was not revoked because of the existence of a "building contractors law" but solely on the basis of political pressure. This is what the proof showed, this is what the trial court found, and this is what the Court of Special Appeals affirmed.

This is hardly a case where "some hardship" is entailed by following an administrative remedy. The project was a $27,000,000 project on which all architectural and engineering work completed, subcontracts for construction let, and construction firmly and in good faith under way. In view of a factual backdrop of admitted malice and conspiracy between the public bodies, to hand the Blumbergs a useless building permit valid for six (6) months only and to require them to pursue the WSSC, a co-conspirator and joint tort-feasor, in a second administrative proceeding (the existence of which would not be known to the

general public for many years) simply cannot be found to present "effective", "available" or "adequate" administrative remedies - not in 1973 and not to the Blumbergs under the facts of this case.

The doubt associated with the jurisdiction of the Board to afford any relief whatsoever, and, even if a remedy was available from the Board, the incomplete nature of it, coupled with the fact that the application of the Administrative Procedures Act to the WSSC was not known, when weighed against the malicious actions of the County and WSSC, illustrative of the worst in abuse of governmental power, go well beyond the degree of hardship and inconvenience that can be associated with an administrative remedy before a finding of inadequacy can be made. Such does not amount to mere inconvenience or some hardship but is tantamount to depriving one a remedy through doubtful and ineffective paper exercises. The Blumbergs had no choice but to go to court nam-

ing both the County and WSSC as defendants, exposing their complicity and seeking complete and effective relief.

4. This Court has concluded that the suit against the WSSC must be dismissed for failure to exhaust administrative remedies. In Katz v. Washington Suburban Sanitary Commission, 284 Md. 503, 397 A.2d 1027 (1979), it was held that the WSSC is an agency of the State. Therefore, the Court concludes that the WSSC's procedures are governed by the Administrative Procedures Act, Article 41, §§ 244-256A, Maryland Code (1957, 1978 Repl. Vol.) ("APA") and the Blumbergs should have appealed the actions of the WSSC with regard to the sewer and water permit to the circuit court under the APA. The Blumbergs request that the Court reconsider this finding for two reasons. First, the appeal found to have been required by the Court would have had to have been taken in 1973, six years before this Court held in Katz that the WSSC should be treated as an agency of the

State. Therefore, prior to Katz, and certainly in 1973, the WSSC was not considered an agency of the State for purposes of the application of the APA. For this reason, therefore, an exception to the exhaustion doctrine should be found applicable in this case. Secondly, the WSSC's action was not a "contested case" and, therefore, even assuming that the WSSC was considered an agency of the State for the purposes of the application of the APA, the actions of the WSSC in this case are not subject to the APA.

Prior to Katz, the WSSC was not treated as a State agency for purposes of the APA. It has long been said that the rule requiring exhaustion of administrative remedies is supported by sound reasons. Fundamentally, these reasons deal with the fact that an administrative agency with its expertise is the most efficient and effective body to deal with an issue within its purview. This and the known jurisdiction of the agency to determine

the issues raised by an appeal are what make an administrative remedy effective and adequate. However, none of these reasons are present when the status of the WSSC is examined in 1973. There was no comprehensive remedial scheme established for administrative review. There was no intermediate administrative appeal, no board of review, no mechanism whatsoever for the expertise of the agency to be exercised on the appellate level, thus defeating the underlying reason and purpose for the exhaustion doctrine. Since no one was aware that the WSSC would be constituted an agency of the State for purposes of the application of the APA, no structure whatsoever existed to effectuate the requirements of the APA.

An administrative remedy is not adequate under the APA if it was not known to exist, would not be known to exist for several years, and was not acknowledged or practiced by the very agency in question. An administrative remedy is not adequate under the APA when no

procedures, as mandated by the APA, are enacted by the agency to allow for and provide a record that may be reviewed on appeal and to assure a fair hearing. No administrative remedy is adequate if, by the lack of procedures, standards and review, each and every purpose cited by this Court for the existence of the doctrine of exhaustion of administrative remedies is defeated. Such is the situation in the instant case. There existed no available, adequate and effective administrative remedy to review the actions of ths WSSC in this case.

Assuming for the sake of argument that in 1973 the procedures of the WSSC were governed by the APA, none of the WSSC actions at issue present a "contested case" thereby invoking the application of the APA. The definition of a contested case is a proceeding before an agency where by law or constitutional right, the rights, duties, or privileges of specific parties must be determined after an agency hearing. In the instant case, this Court finds

that the law did not require a hearing before the WSSC suspended and later revoked the water and sewer permits of the Blumbergs. The WSSC acted to "suspend the efficacy" of the Blumbergs' permits on April 11, 1973. This was done at a regularly scheduled meeting of the WSSC without notice to the Blumbergs or hearing. Later, on May 23, 1973, the WSSC placed the issue on its regular agenda for consideration of pending matters. There is absolutely no indication that the proceeding on May 23, 1973, afforded the Blumbergs procedural due process as required under the APA. Merely because the WSSC placed the matter on its regular agenda and allowed comment from those present does not make it a "contested case". If this were so, then any matter considered in open session by a State agency would be a contested case simply by virtue of the fact that it was considered in open session.

5. The Blumbergs contend that it was error for the trial court to sustain the de-

murrers of former County Executives Gullett and Kelly without leave to amend. This Court has concluded the the trial court did not err when it so dismissed the suit. The Blumbergs call to the Court's attention the specific findings of malice made by the trial court and upheld by the Court of Special Appeals. These findings and those set forth in the briefs of the Blumbergs filed herein are the proffer on the part of the Blumbergs that a claim for individual tort liability not only can be stated but was actually found. In addition, this Court did not consider or rule on the Blumbergs' contention that the demurrers failed to raise failure to state a cause of action as a ground. The trial court may not consider as a ground for a demurrer any ground not specifically alleged in a demurrer.

WHEREFORE, the Blumbergs respectfully request that this Court reconsider its decisions in this case as set forth in its Opinion filed on August 22, 1980, and find that the doctrine

of exhaustion of administrative remedies is not applicable as found and that the demurrers of Gullett and Kelly should not have been sustained without leave to amend. In so doing, the Blumbergs request that this Court modify its decision of August 22, 1980, to (1) affirm the judgment of the trial court directing Prince George's County and the WSSC to reissue their respective permits, (2) affirm the judgment of the trial court for damages against Prince George's County as to liability and amount, (3) reverse the order of the trial court dismissing the action for damages against WSSC, and (4) reverse the order sustaining the demurrers of Gullett and Kelly.

In the alternative, the Blumbergs request that this Court reconsider its decisions in this case as set forth in its Opinion filed August 22, 1980, and rule on the Blumbergs' damage claims. In so doing, the Blumbergs request that this Court modify its decision of August 22, 1980, to (1) affirm the judgment of

the trial court for damages against Prince George's County as to liability and amount, (2) affirm the order of the Court of Special Appeals reversing the trial court's order dismissing action for damages against the WSSC, and (3) reverse the order of the trial court sustaining the demurrers of Gullett and Kelly.

LINOWES AND BLOCHER

By: /s/
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By: /s/
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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THE
BLUMBERGS' MOTION FOR RECONSIDERATION

1. The actions of the County in the instant case are not reviewable by the Board of Appeals.

Prince George's County as a charter county may exercise only those legislative powers expressly granted to it pursuant to the Express Powers Act, Md. Code (1957, 1973 Repl. Vol., 1979 Cum. Supp.). Article 25A, § 5(U), specifically delegates to chartered counties the authority to enact local laws to provide for a county board of appeals to review certain specified actions of an administrative officer or agency. In pertinent part, this Section grants and confers upon said counties the power

> "[t]o enact local laws providing (1) for the establishment of a county board of appeals . . . and (4) for the decision by the board on petition by any interested person . . . of such of the following matters arising (either originally or on review of the action of an administrative officer or agency) under any law, ordinance, or regulation of . . . the county council, as shall be spe-

cified from time to time by such local laws enacted under this subsection: . . . the issuance, renewal, denial, revocation, suspension, annullment, or modification of any license, permit, approval, exception, waiver, certificate, registration, or other form of permission or any adjudicatory order . . ." (Emphasis supplied)

Section 5(U) is an authorization. This Section neither creates a board of appeals nor, if one is created by local law, imbues it with broader jurisdiction than that specified in the local law enacted to identify the matters which the board may review consistent with those enumerated in Section 5(U) above. If the entitlement of Section 5(U) is exercised, the statute requires the enactment of local legislation by a chartered county to (1) establish a board of appeals and (2) specify which of the enumerated matters in Section 5(U), i.e., issuance, denial, revocation, etc., the board is to review.

When Prince George's County became a chartered county in 1970, it was, therefore, authorized under the provisions of Article 25A,

§ 5(U), to enact local laws establishing a board of appeals and specifying which of the permitted matters that board could review. As indicated, Section 5(U) specifically lists those matters which may be heard by any board of appeals and specifically states that a local law must be enacted by any chartered county which creates such a board to specify which or all of these matters the board may review on appeal.

The County, by § 2-111 of the Prince George's County Code, 1975, created a Board of Administrative Appeals "to hear and determine all administrative appeals allowed by ordinance or law," excepting three situations not here relevant. Section 4-140 of the Prince George's County Code, 1975, amends § 127.0 of the BOCA Code dealing with appeals to the Board of Appeals.

> "Application for Appeal: The owner or occupant of the building or structure or any directly aggrieved person may appeal to the board of appeals from a final decision of the Building Official refusing to grant

> a modification of the provisions of the Basic Code or of this Ordinance. Application for appeal may be made when it is claimed that: The true intent of the Basic Code or of this Ordinance has been incorrectly interpreted or applied. Notice of such appeal shall be in writing and filed within thirty (30) days after the decision is rendered by the Building Official."

The question raised is whether § 4-140 of the County Code specifies that only the action of the Building Official in refusing to grant a modification of the Basic Code or Buildings Chapter is reviewable by the Board or whether this section also permits review by the Board of matters arising from the "issuance, renewal, denial, revocation, suspension, [and] annullment . . ." of a permit, license or other approval. See Article 25A, § 5(U).

It is familiar law that the courts should confine themselves to the construction of a statute as written and not attempt, under the guise of construction, to supply omissions or remedy possible defects in a statute. Amalgamated Casualty Insurance Co. v. Helms, 212

A.2d 311, 316, 239 Md. 529 (1965). As recently stated by this Court in State v. Berry, 413 A.2d 557, 559, ___ Md. ___ (1980), "[t]he statutory language itself provides the clearest indication of the legislative intent and is thus the primary source for all statutory construction". Thus, if no ambiguity is found, the Court is not called upon to construe the meaning of the statute because the legislative intent is clear from the langage uses.

Section 4-140 of the County Code refers only to an appeal from a final decision of the Building Official refusing to grant a "modification" of the Basic Code or Buildings Chapter. The language specifies only "modification" and excludes any reference to the issuance, renewal, denial, revocation, suspension or annullment of a permit, license, approval, exemption, waiver, certificate, or registration. See Article 25, § 5(U). Thus, since no local law was enacted under the Buildings Chapter as required by Article 25A, § 5(U), to

grant the Board of Appeals authority to review anything other than the refusal to grant a modification as stated, the Board has no authority to review the actions of the County in this case. This Court cannot, under the guise of construction, attempt to supply omissions in the law or to extend the application of the law. The language of § 4-140 is not ambiguous. In order to appeal to the Board, there must be a request for modification of a provision of the Basic Code or the Buildings Chapter to the Building Official and this request must be refused. Only then can a "directly aggrieved person" appeal to the Board.

In addition, when a requested modification has been denied, application for appeal may be made by the directly aggrieved person when he contends "[t]hat the true intent of the Basic Code or of this Ordinance has been incorrectly interpreted or applied." See § 4-140, Prince George's County Code. This sentence does not, as this Court found, extend

the jurisdiction of the Board to review stop work orders or declarations by the Building Official that a building permit previously issued is null and void, matters at issue in the instant case, but rather allows an aggrieved person, i.e., one who has been denied a modification of the Building Code or Buildings Chapter to argue that the Board is not bound by the literal terms of the ordinance but may modify such terms by considering the ordinance as a whole in order to effect the intent thereof. This allows an aggrieved person to argue, consistent with his request for a modification, that although the language of the provision at issue may specifically require a certain construction material, etc., the intent of the legislature is to be gathered by an examination of the legislation as a whole, thus allowing the Board to rule favorably on the requested modification if it effectuates this intent. Thus, the second sentence of § 4-140 of the County Code does not extend the jurisdiction of

the Board, as found by the Court, but merely allows an applicant, whose very case is founded upon a request to do other than the express language of the legislation permits, to free himself from the established principle of law that the intent of the legislature is first to be found in the express language of the legislation. If an aggrieved party were not released from the application of this cardinal rule of statutory construction, he would never be able to prevail on a request for a modification.

2. A. Under the facts of this case, any administrative remedy found by the Court is not exclusive.

The Blumbergs' bill of complaint states a cause of action for tortious interference with vested property rights and civil conspiracy. Further, the Blumbergs claim that the actions of the County and the WSSC constitute a taking in violation of their constitutional rights for which they seek damages.

The County did not raise the issue of exhaustion in any pre-trial pleading. Therefore, the doctrine, or an exception to it, must be judged based upon the evidentiary record made in the trial court.

The trial court found that the Blumbergs had obtained vested rights in their permits, that a conspiracy to stop the project existed, that the actions of the County and WSSC with regard to the permits was wrongful, and that William Gullett, a County public official, acted maliciously, i.e., intentionally committed wrongful acts without legal justification or excuse. The Court of Special Appeals, upon review of the record, found that the evidence "fully supports" the trial court's conclusions. Thus, this Court must review the question of whether the statutory remedies it has found to have been available to the Blumbergs were exclusive in view of the evidentiary record herein or whether the questions presented are essentially judicial and, there-

fore, reviewable by courts of law.

The Blumbergs' claims with regard to tort were fully cognizable in the trial court as an original matter. The Blumbergs could have simply abandoned the project, not sought the return of their permits, and sued the County and WSSC for damages as a result of their tortious actions. The Board of Appeals cannot render a binding judgment or award damages. To find, as this Court has done, that the instant case must be dismissed because of exhaustion doctrine is to find that the Blumbergs are precluded from ever asserting a claim in tort against the County and WSSC for their wrongful actions. Certainly such a claim cannot be asserted in an administrative action.

As in Maryland-National Capital Park and Planning Commission v. Washington National Arena, 232 Md. 588, 386 A.2d 1216 (1978), this is a case where even if it is assumed that administrative remedies are available to review the question of the restoration

of the permits, a judicial decision is preferable. The Blumbergs' tort claims are cognizable in the trial court as an original matter. The question of vested rights, validity of the permits, conspiracy, malice and tortious interference with property rights are purely legal questions that do not involve the type of expertise and technical knowledge employed in administrative fact-finding. Here, as in Washington National Arena, the benefits of a resolution of the contentions presented by a court competent to render a final and binding judgment clearly outweigh any purported advantages to be achieved by a review by the Board of Appeals or adherence to the APA.

The alleged existence of a right to complain to the Board concerning building official's failure to modify a building permit or to appeal to the circuit court under the APA from the actions of the WSSC are not such statutory remedies as preclude the determinations of the tort claims in this pro-

ceeding. The constitutional right of access to the courts to seek redress for tortious wrongs places the declaratory and injunctive relief sought herein into the category of "a concurrent . . . extraordinary legal remedy, whether or not recognized or regulated by statute" (§ 3-409(c) of the Courts and Judicial Proceedings Article), rather than "a special form of remedy for a specific type of case" within the meaning of Section 3-409(b) of the Court's Article. See Cambridge v. Eastern Shore Pub. Serv. Co., 192 Md. 333, 64 A.2d 151 (1949); Maryland Nat., etc. v. Washington Nat. Arena, supra.

B. Assuming this Court maintains its position that the administrative remedies it has found are exclusive as to the question of restoration of the permits and that no exception to the doctrine is presented, this Court erred in not reviewing the Blumbergs' claims with regard to damages.

The Fourteenth Amendment to the

Constitution of the United States provides that "[n]o State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See also Article 23, Declaration of Rights of Maryland.

Article 19 of the Declaration of Rights of Maryland guarantees a remedy to all persons for injury to property.

> "That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without fail, fully without any denial, and speedily without delay, according to the Law of the land."

It is established law that the power of the legislature to impose conditions upon the right to turn to the courts for redress of grievances must be exercised within constitutional limits. Attorney General v. Johnson, 282 Md. 274, 385 A.2d 57 (1978). As this Court stated in Johnson, quoting Jones v. Union Guano Co., 264 U.S. 171, 181, 44 S. Ct.

280, 282, 68 L.Ed. 623 (1924),

> "[n]either the fourteenth amendment nor our Constitution 'prevent[s the General Assembly] from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real, and the condition imposed has reasonable relation to a legitimate object." (385 A.2d at 62)

The exhaustion doctrine in this case, therefore, if considered applicable, pertains only to the "suit of a specified kind or class", i.e., whether the Blumbergs' permits should be restored. Certainly, such a decision, strictly limited to the question of the restoration of the permits, is not a condition precedent to bringing an action for conspiracy, tortious interference with vested property rights or a taking without compensation associated with bad faith actions of the government. Arnold v. Prince George's County, 270 Md. 285, 311 A.2d 223 (1973). If the Blumbergs are denied access to the Courts with regard to their tort and constitutional claims as herein expressed, claims independent of a

specified type for which this Court find review is required by statute, there is a violation of the Federal and State Constitutions insuring due process of law and the availability of a remedy for an injury done to a person or his property.

3. A. Assuming an administrative appeal to the Board of Appeals existed, the Board had no authority to reissue to the Blumbergs' building permits in the absence of a valid sewer and water permit.

Section 4-230 of the Prince George's County Code, 1972, provided that

> "[a] building permit shall not be issued under the provisions of the Basic Code and of this Subtitle unless and until there has been full compliance with the applicable requirements contained therein, and with all statutes, ordinances and regulations containing provisions related to and essential to the safety, health, sanitation and welfare of the occupants or future occupants of any building, structure or premises; such as, but not restricted to . . . the Sewerage and Sewerage Disposal Ordinance . . ."

Thus, it was required and con-

ceded to be so by the County, that a water and sewer permit must be obtained prior to the issuance of a building permit. This Court finds that the aforementioned prohibition against the issuance of a building permit could have been varied by the Board of Appeals and the building permit issued despite the absence of a sewer and water permit. Assuming that this Court is correct and § 4-141 authorizes the Board to vary local law with regard to matters such as the requirement for adequate sewerage, the Board would have no authority under Section 4-141, a local law, to vary the application of a public general law. Bowie v. Wash. Sub. San. Comm'n, 249 Md. 611, 241 A.2d 396 (1968); Board of Appeals v. Marina Apts., 272 Md. 691, 326 A.2d 734 (1974); Prince George's County v. Maryland-National Capital Park and Planning Commission, 269 Md. 202, 306 A.2d 223 (1973).

Article 43, § 387C(d)3 states in pertinent part,

> "[n]o State or local authority empowered to grant building permits

> . . . shall grant any such permit . . . which provides for individual or community water supplies sewerage systems . . . unless such systems or facilities are found to be in conformance with the county plan, amendments, or revisions thereof. This means that:
>
> (i) No building permit shall be approved (1) where existing facilities are inadequate to serve the proposed development, taking into consideration all other existing improved developments in the service area, or (2) which will cause facilities for conveyance, pumping, storage or treatment of water, sewerage or solid waste to be overloaded."[2]

Thus, once there has been a determination that existing facilities are inadequate to serve the development or will cause various components of the system to be overloaded, the Board is precluded by State law from issuing a building permit. It is acknowledged by all concerned that the Board, on questions of the grant or denial of a sewer and

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[2]It is noted that Chapter 618, Acts of 1975, effective July 1, 1974, added all of subsubsection 3 of subsection (d) following the first sentence therein. This, however, did not change or expand the provision but merely elaborated on the requirement as stated herein.

water permit, has no jurisdiction to review the WSSC's actions. See Board of Appeals v. Marina Apts., supra. The Board, not being able to challenge the WSSC's determinations with regard to the Blumbergs' sewer and water permit, must accept those determinations. Once accepted, the Board was powerless [Article 43, Section 387C(d)3] to issue the Blumbergs a building permit.

B. Assuming the administrative remedies found by this Court exist, these remedies were not adequate and provide an exception to the doctrine of administrative remedies.

This Court recognizes that impossibility or improbability of obtaining adequate relief is a reason for dispensing with the exhaustion requirement. Poe v. Mayor and City Council of Baltimore, 241 Md. 303, 216 A.2d 707 (1966); Verkouteran v. Supervisor of Assessments, Montgomery County, 38 Md. App. 216, 380 A.2d 642 (1977). However, the Court concludes that the Blumbergs did have avail-

able, effective administrative remedies which they failed to utilize, thus necessitating the dismissal of this case against the County and WSSC. The Blumbergs respectfully request that the Court reconsider its finding on this point. The application of the exhaustion doctrine is both unjust and impractical in this case.

All parties and the Court acknowledge that the County Board of Appeals has no jurisdiction over the WSSC and cannot, therefore, countermand a decision of the WSSC with regard to sewer service. However, despite this fact, this Court has concluded that the Blumbergs were required to "follow the exclusive review procedures of Prince George's County with respect to the building official's actions" (Opinion, p. 24). Whether or not administrative remedy is "exclusive" is not the focus when one is considering whether that administrative remedy is adequate and hence an exception to the exhaustion doctrine is presented. As fully discussed in the body of this

motion for reconsideration at pps. 5 through 8, to find that the Blumbergs had available, effective, adequate administrative remedies under the facts of this case is to deny the existence of the exception at issue.

4. A. Assuming that, as a State agency, the procedures of the WSSC are governed by the Administrative Procedures Act, the instant case presents an exception to the application of the exhaustion doctrine.

Maryland appellate courts have consistently recognized that the statutory rule of exhaustion is not absolute. This means that even though a special form of remedy for a specific type of case exists, it need not be followed when certain circumstances exist. For guidance, the Court has identified recognized exceptions to the exhaustion doctrine. The exception at issue in the present case is whether "the special form of remedy is inadequate or does not provide for judicial review." Verkouteran v. Sup'r of Assessments, Mont.

Cty., 38 Md. App. 216, 380 A.2d 642, 644 (1977).

The WSSC never raised failure to exhaust administrative remedies in this case. However, this Court, citing Katz v. WSSC, supra, concludes that since the WSSC has now been determined to be an agency of the State, its procedures are governed by the Administrative Procedures Act, which provides a special form of remedy for a specific type of case which must be followed under the exhaustion doctrine and, therefore, the Blumbergs' case against the WSSC must be dismissed. By this motion to reconsider, the Blumbergs raise the issue of whether an alleged special form of remedy, if unknown, can in retrospect be deemed adequate for purposes of the exhaustion doctrine. The result is that the Blumbergs' case is dismissed. The appeal in question would have had to have been filed in 1973. Thus, by the Court's ruling, the Blumbergs are precluded

from ever asserting their claims for restoration of the sewer and water permit and for damages for the tortious actions of the WSSC. The Katz case was decided by this Court in 1979. It is readily apparent that the APA was not followed or acknowledged to be applicable to the WSSC in 1973.

Recently, this Court, in Secretary, Dept. of Human Resources v. Wilson, 409 A.2d 713 (1979), thoroughly discussed the underlying rationale for the exhaustion requirement and, by example, described the elements that insure achievement of these principles. In summary, a comprehensive remedial scheme in which a claim is first determined by the administrative agency and then reviewed by an administrative appeal before judicial review is available insures "the most efficient and effective results" (409 A.2d at 717). The Court continues by detailing the various elements of the remedial scheme for the processing of unemployment compensation claims. This

scheme includes such items as (1) mechanism for filing claims, (2) requirements for examiner determinations, (3) requirement of notice of a determination to a claimant, (4) initial appeal to a referee, and (5) a right of appeal to a board of appeals appointed by the Secretary of Human Resources which

> "gives notice, holds hearings, subpoenas witnesses, takes evidence and establishes a record for the purpose of ascertaining the substantial rights of the parties." (409 A.2d at 718)

If aggrieved by the decision of the Board, a party may secure judicial review to the circuit court and then the Court of Special Appeals. However, "[u]pon judicial review, courts are limited to considering questions of law decided by the Board. The Board's findings in fact, if supported by evidence are conclusive." (409 at 718) After reviewing this scheme, this Court stated that "there is nothing to show that the available administrative remedy is not effective." (409 at 718)

In contrast, when the instant situ-

ation is analyzed, there is nothing to show that the administrative remedy in question was available in practice and, therefore, it cannot be determined to have been an effective, available, adequate statutory remedy for the Blumbergs with reference to the actions of the WSSC. Since the remedy found by this Court was not "adequate and available", an exception to the exhaustion doctrine is presented in this case, and the action against the WSSC should not be dismissed. Agrarian v. Zoning Inspector of Harford County, 262 Md. 329, 277 A.2d 591 (1971).

B. If the exhaustion doctrine is applied with reference to the actions of the WSSC, the proceedings in question are not a contested case within the meaning of the Administrative Procedures Act.

The Administrative Procedures Act, Article 41, § 244(c), defines a contested case as follows:

> "[A] proceeding before an agency in which the legal rights, duties, sta-

> tutory entitlements, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."

This Court has stated that in the instant case,

> "there are no statutory provisions requiring the WSSC to hold hearings on the refusal to issue or revoke water and sewer permits; nor were there, at the time of the agency's actions here, any rules or regulations by the WSSC providing for a hearing right."

Despite this finding, this Court holds that since the WSSC "provide[d] . . . a hearing" before revoking the permits, a fortiori, this is a contested case. No analysis of the fairness of this hearing has been made. Clearly, there were, as acknowledged by this Court, no distinct procedures established for a hearing. The Blumbergs' water and sewer permit was "suspended" on April 11, 1973, without notice and without hearing, pending further actions by the WSSC. Thereafter, the WSSC placed the matter on its regular agenda. The APA is specific as to the notice which must be given in a contested case, the record that must

be kept, the rules of evidence, requirements for decisions and orders, and prohibitions against ex parte communications. These matters are specified in order to insure that parties to the proceeding are afforded due process and a proper record is made for judicial review. This is necessary since the scope of the court's review of an administrative action is narrow and limited to the record made. Bullock v. Pelham Wood Apts., 223 Md. 505, 390 A.2d 1119 (1978); Oxon Hill Recreation Club, Inc. v. Water Resources Administration, 281 Md. 110, 375 A.2d 567 (1977).

5. The action of the trial court sustaining the demurrers of Gullett and Kelly should be reversed.

This Court has concluded that the trial court did not err when it sustained the demurrers of Gullett and Kelly without leave to amend. The Court finds that the original and amended bill of complaint did not state a cause of action against Gullett and Kelly. In making

this finding, the Court failed to consider the Blumbergs' contention that Gullett and Kelly did not advance as a ground of their demurrers that the facts alleged in the amended complaint were insufficient to state a cause of action against them. On demurrer, a court cannot consider any ground other than one specifically alleged in the demurrer. Hall v. Barlow Corporation, 255 Md. 28, 255 A.2d 873 (1969); Kline v. Lightman, 243 Md. 460, 221 A.2d 675 (1966); Shoreham Developers, Inc. v. Randolph Hills, Inc., 269 Md. 291, 305 A.2d 465 (1973). Consequently, the circuit court was in error when it dismissed the suit against Gullett and Kelly.

In addition, this Court has held that "[w]e have not been convinced by any proffer on the part of the Blumbergs that a third one [referring to bill of complaint] would alleviate the defect in the other two." (Opinion, pp. 31-32) How the bill of complaint could be amended is outlined in the briefs filed by the

Blumbergs herein. Moreover, the trial court made affirmative findings of malice based on the evidentiary record. These findings were affirmed by the Court of Special Appeals. Without repeating the facts which established malice, in view of this evidentiary record, the bill of complaint, if required by this Court, could be amended to further reflect these facts. Therefore, it is respectfully requested that this Court reconsider its findings with reference to the demurrers.

6. Maryland Rule 850 provides that a motion for reconsideration of a decision other than one granting or denying certiorari, specifying the grounds therefor, may be filed within 30 days after the opinion of this Court has been filed.

LINOWES AND BLOCHER

By: /s/
Joseph P. Blocher

By: /s/
Barbara A. Sears

8720 Georgia Avenue
Fifth Floor
Silver Spring, MD 20910

Attorneys for the Blumbergs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of September, 1980, two copies of the foregoing Motion for Reconsideration were hand delivered to Paul T. Sisson, Attorney for the Washington Suburban Sanitary Commission, 6525 Belcrest Road, Room 1001, Hyattsville, Maryland 20782; and to Alan E. D'Appolito, Esquire, Associate County Attorney for Prince George's County and attorney for Winfield M. Kelly, Jr., and

William W. Gullett, 5104 County Administration Building, Upper Marlboro, Maryland 20870.

/s/
Barbara A. Sears

PRINCE GEORGE'S COUNTY, MARYLAND, et al.	*	IN THE
	*	COURT OF APPEALS
v.	*	OF MARYLAND
HERSCHEL BLUMBERG, et al.	*	No. 147
		September Term, 1979

O R D E R

Upon consideration of the motion for reconsideration filed in the above entitled case, it is this 26th day of September, 1980,

ORDERED, by the Court of Appeals of Maryland, that the motion for reconsideration be, and it is hereby, denied.

/s/
Chief Judge

PRINCE GEORGE'S COUNTY, MARYLAND ET AL,	*	IN THE
	*	COURT OF SPECIAL APPEALS
Appellants	*	OF MARYLAND
v.	*	No. 152, September Term, 1979
HERSCHEL BLUMBERG ET AL,	*	(No. 147, September Term, 1979,
Appellees	*	In the Court of Appeals of Maryland)

O R D E R

Pursuant to the mandate of the Court of Appeals of Maryland entered on the 3rd day of October, 1980, reversing in part and affirming in part the judgment of this Court entered on the 7th day of November, 1979;

It is therefore this 9th day of October, 1980, by the Court of Special Appeals of Maryland,

ORDERED, that the mandate of this Court issued on the 7th day of December, 1979, be, and the same is hereby vacated; and it is further,

ORDERED, that the judgment of the Circuit Court for Prince George's County as it pertains to Prince George's County and the Washington Suburban Sanitary Commission be, and the same, is hereby reversed and the case is remanded to that Court with instructions to reverse the judgment entered in the Circuit Court for Prince George's County against those two defendants, without a new trial. Judgment as to William W. Gullett and Winfield M. Kelley, Jr., affirmed. Costs to be paid by Marion and Herschel Blumberg.

/s/
CHIEF JUDGE

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

Constitutional Provisions

First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the Constitution

of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 19, Declaration of Rights of Maryland:

> "That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land."

Statutes

Art. 25A, § 5

(U) County Board of Appeals

To enact local laws providing (1) for the establishment of a county board of appeals whose members shall be apointed by the county council; (2) for the number, qualifications, terms, and compensation of the members; (3) for the adoption by the board of rules of practice governing its proceedings; and (4) for the de-

cision by the board on petition by any interested person and after notice and opportunity for hearing and on the basis of the record before the board, of such of the following matters arising (either originally or on review of the action of an administrative officer or agency) under any law, ordinance, or regulation of, or subject to amendment or repeal by, the county council, as shall be specified from time to time by such local laws enacted under this subsection; an application for a zoning variation or exception or amendment of a zoning ordinance map; the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval, exemption, waiver, certificate, registration, or other form of permission or of any adjudicatory order; and the assessment of any special benefit tax: Provided, that upon any decision by a county board of appeals it shall file an opinion which shall include a statement of the facts found and the grounds for its decision. Any person aggrieved by the decision of the board and a party to the proceeding before it may appeal to the circuit court for the county which shall have power to affirm the decision of the board, or if such decision is not in accordance with law, to modify or reverse such decision, with or without remanding the case for rehearing as justice may require. Any party to the proceeding in the circuit court aggrieved by the decision of the said court may appeal from such decision to the Court of Appeals. The review proceedings provided by this subsection shall be exclusive.

* * *

ADMINISTRATIVE PROCEDURE ACT

§ 244. DEFINITIONS.

For the purpose of this subtitle:

(a) "Agency" means any State board, commission, department or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches, and the Governor, and except the Maryland Parole Commission, the Workmen's Compensation Commission, the State Accident Fund, the State Insurance Department of Maryland, the Public Service Commission, the Employment Security Board and the State Tax Commission. The Maryland Automobile Insurance Fund shall not be considered an "agency" within the meaning of this section as to any matter or action with regard to which the Insurance Commissioner has made an express, written finding or determination that compliance with the provisions of the Administrative Procedure Act by the Maryland Automobile Fund is unnecessary. "Agency" also includes any agency created by general law, which operates in two or more political subdivisions.[1]

(b) "Rule" includes every regulation, standard, guideline, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization, procedure, or the practice before such agency, but does not include regulations concerning only the internal management of the agency and not directly affecting the rights of or procedures available to the public, responses to petitions for adoption of rules issued pursuant to § 248

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[1]The sentence " 'Agency' also includes any agency created by general law, which operates in two or more political subdivisions, . . ." at the end of subparagraph (a) was added on July 1, 1978, by Chapter 884, Acts of 1978.

of this article, or declaratory rulings issued pursuant to § 250 of this article.

(c) "Contested case" means a proceeding before an agency in which the legal rights, duties, statutory entitlements, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

(d) "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but it does not include a license required solely for revenue purposes.

(e) "Licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license. (1957, chs. 94, 428; 1963, ch. 305; 1972, ch. 569; 1974, ch. 211; 1976, ch. 648; 1977, ch. 528, § 1; 1978, chs. 858, 884; 1980, ch. 241.)

* * *

§ 245. ADOPTION OF RULES.

In addition to other rule-making requirements imposed by law:

(a) Each agency shall adopt rules governing the formal and informal procedures prescribed or authorized by this subtitle. The rules shall include rules of practice before the agency together with forms and instructions; but no rule or practice may interfere with the right of any lawyer to practice before any agency, or grant the right to practice law to anyone not authorized to do so.

(b) To assist interested persons dealing with it, each agency shall so far as practic-

able supplement its rules with descriptive statements of its procedures.

(c) An agency may not adopt or amend any rule or administrative act which increases the agency's expenditures beyond budgetary limitations without the express approval of the General Assembly; or if the General Assembly is not then in session, without the express approval in writing of the President of the Senate and the Speaker of the House of Delegates, acting jointly and after consulting with and receiving the advice in writing of the Joint Budget and Audit Committee. Approval by the General Assembly or its presiding officers, as provided in this section, is not required if the Governor by proclamation declares that the rule or administrative act to increase an agency's expenditures beyond budgetary limitations is necessary and a matter of emergency. This limitation with respect to the agency's budget is applicable to every agency in the executive, judicial, and legislative branches of government, except bicounty commissions appointed by local governing bodies who review the commissions' budgets, notwithstanding any exemptions from the provisions of this subtitle contained in § 244(a) of this subtitle.

(d) Repealed by Acts 1979, ch. 499; effective July 1, 1979.

* * *

§ 247. PUBLICATION, COMPILING AND INDEXING OF RULES OR REGULATIONS.

Every agency, department, or other governmental body or unit, quasi-governmental body or unit having the authority or power to adopt or promulgate rules or regulations affecting any member of the general public, shall prepare and provide for the editing, publishing, compiling and indexing of all the rules

and regulations. Except for bicounty and multicounty commissions appointed by local governing bodies, the form and manner of printing the compilations and any other details relating thereto shall be pursuant to the State Documents Law.

Nothing in this section applies to an agency whose authority is limited to the promulgation of rules and regulations affecting its internal administration.

§ 248. PETITION FOR ADOPTION OF RULES.

Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition. Within 60 days after submission of a petition, the agency shall either deny the petition in writing (stating the reasons for the denial) or initiate rulemaking proceedings.

* * *

§ 249. DECLARATORY JUDGMENT ON VALIDITY OF RULES; SEVERABILITY OF RULE PROVISIONS.

(a) The validity of any rule may be determined upon petition for a declaratory judgment thereon addressed to the circuit court of the particular county or to the Baltimore City Court either where the petitioner resides or has his or its principal place of business, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may

be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

(c) The provisions of a rule are severable unless the rule expressly states that its provisions are not severable. The finding by a court that a provision of a rule is void or unenforceable does not affect the validity of any other provisions of the rule unless the court finds that the remaining valid provisions alone are incomplete and incapable of being executed in accordance with the regulatory intent.

§ 250. PETITION FOR DECLARATORY RULINGS BY AGENCIES.

On petition of any interested person, the agency may issue a declaratory ruling with respect to the applicability of any rule, order, or statute enforceable by it to any person, property, or statement of facts. If issued a declaratory ruling is binding between the agency and the petitioner on the state of facts alleged. Such a ruling is subject to review in the circuit court of the county or the Baltimore City Court, as the case may be, in the manner hereinafter provided for the review of decisions in contested cases. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

* * *

§ 251. CONTESTED CASES -- NOTICE.

(a) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. Publication in the Maryland Register pursuant to § 256 P of this article may not constitute reasonable notice to a party.

(b) The notice shall include:

(1) A statement of the time, place, and nature of the hearing;

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) A reference to the particular sections of the statutes and rules, including rules of procedure, involved; and

(4) A short and simple statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

§ 251A. SAME -- PREHEARING CONFERENCES; HEARING OFFICER; STIPULATION, AGREED SETTLEMENT, ETC.; RULES OF PROCEDURE.

In contested cases:

(a) An agency may provide by regulation for prehearing conferences or other appropriate prehearing procedures.

(b) In addition to any other hearing

authority or procedure authorized by law:

Any agency, official, or employee authorized by law to hear and decide a contested case may, on an ad hoc basis, delegate its hearing authority to a hearing officer who shall conduct a hearing and shall submit written findings of fact and proposed conclusions of law to the agency head, official, or employee.

(c) Disposition may be made of any case by stipulation, agreed settlement, consent order, or default, unless otherwise precluded by law.

(d) Each agency shall adopt rules of procedure for hearings in contested cases.

§ 252. SAME -- RULES OF EVIDENCE; OFFICIAL NOTICE.

In contested cases:

(a) Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

(b) All evidence, including records and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(c) Every party shall have the right on

every genuine issue: (1) to call witnesses and present evidence; (2) to cross-examine every witness called by the agency or any other party; (3) to submit rebuttal evidence; and (4) to present summation and argument.

(d) Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence and specialized knowledge in the evaluation of the evidence presented to them.

§ 252A. SAME -- RECORD.

(a) Except when a de novo review is provided by law, the record in a contested case shall include:

(1) All pleadings, motions, intermediate and final rulings;

(2) Documentary evidence received or considered;

(3) Any statement of matters officially noticed;

(4) Any questions and offers of proof, objections, and rulings thereon;

(5) Any proposed findings and exceptions;

(6) The decision, opinion or report by the officer presiding at the hearing; and

(7) Any staff memorandum submitted to the hearing officer or any other member of the agency involved in the decisional process of that case by any agency official or employee other than those authorized to participate in the decisional process of that case.

(b) Oral proceedings or any part thereof shall be transcribed on request of any party and upon payment of costs as may be required.

§ 253. SAME -- EXAMINATION OF EVIDENCE BY AGENCY.

Whenever in a contested case, a majority of the officials of the agency who are to render the final decision have not heard the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

§ 254. SAME -- DECISIONS AND ORDERS.

A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each pro-

posed finding. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed promptly to each party or to his attorney of record.

§ 254A. SAME -- EX PARTE COMMUNICATIONS.

(a) Any persons, including an agency head, not authorized to participate in the decisional process of a contested case shall not communicate ex parte with the hearing officer, or any other agency official or employee involved in the decisional process of that case regarding any issue of fact or law in the case. The hearing officer or agency officials may communicate with members of an advisory staff, including any agency legal counsel, who do not otherwise participate in the proceeding.

(b) A hearing officer, or agency official or employee involved in the decisional process of a contested case who is personally aware of an ex parte communication in violation of subsection (a) shall place on the record all written communications received, a memorandum stating the substance of all oral communications received, all written responses to the communication, and a memorandum stating the substance of all oral responses made and shall send copies of such communications, memoranda, and responses to all parties. Any party desiring to rebut the ex parte communication shall be allowed to do so upon request within ten days after notice of the communication. The hearing officer may, if he deems it necessary to eliminate the effect of a prohibited ex parte communication: (1) withdraw from the proceeding; or (2) terminate the proceeding without prejudice. Whenever the hearing officer terminates a proceeding without prejudice, the order terminating the proceeding shall specify the date by which the proceeding may be reinstituted.

§ 255. SAME -- JUDICIAL REVIEW.

(a) Right to review. -- Any party aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this subtitle.

(b) Where proceedings instituted; intervening parties. -- Proceedings for review shall be instituted in the circuit court of the county or in the Baltimore City Court, as the case may be, either where any party resides or has his or its principal place of business. The court, in its discretion may permit other interested persons to intervene.

(c) Stay of enforcement of decision. -- The filing of the petition does not itself stay enforcement of the agency decision. Except as otherwise provided by law, the agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(d) Additional evidence. -- If, before the date set for hearing, application is made to the court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. If additional evidence is taken before the agency, it may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(e) Hearing without a jury; testimony, oral argument and written briefs. -- The review

shall be conducted by the court without a jury. In cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(f) Affirmance, remand, reversal or modification of decision. -- The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

§ 256. SAME -- APPEALS TO COURT OF SPECIAL APPEALS.

An aggrieved party may secure a review of any final judgment of the circuit court or Baltimore City Court, as the case may be, under this subtitle by appeal to the Court of Special Appeals. The appeal shall be taken in the manner provided by law for appeals from law courts in other civil cases. This section does not apply to cases arising under the Maryland

Vehicle Law unless a right to appeal to the Court of Special Appeals is specifically provided, or to review or to further review of a final judgment of a circuit court or the Baltimore City Court in relation to an action of the Inmate Grievance Commission.

* * *

Art. 43, § 387C(d)3

> "[n]o State or local authority empowered to grant building permits . . . shall grant any such permit . . . which provides for individual or community water supplies or sewerage systems . . . unless such systems or facilities are found to be in conformance with the county plan, amendments, or revisions thereof. This means that:
>
> (i) No building permit shall be approved (1) where existing facilities are inadequate to serve the proposed development, taking into consideration all other existing approved developments in the service area, or (2) which will cause facilities for conveyance, pumping, storage or treatment of water, sewerage or solid waste to be overloaded."

* * *

§ 3-409. DISCRETIONARY RELIEF.

* * *

(b) Special form of remedy provided by statute. -- If a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed in lieu of a proceeding under this subtitle.

(c) Concurrent remedies not bar for declaratory relief. -- A party may obtain a declaratory judgment or decree notwithstanding a concurrent common-law, equitable, or extraordinary legal remedy, whether or not recognized or regulated by statute.

* * *

Ordinances

Prince George's County Charter

ARTICLE X

General Provisions (1970)

Section 1013. GOVERNMENTAL LIABILITY. The County may be sued in actions sounding in tort in the same manner and to the same extent that any private person may be sued. The County shall carry liability insurance with adequate limits to compensate for injury to persons or damage to property resulting from negligence and other wrongdoings of its officers, agents, and employees. Nothing herein shall preclude the County from meeting the requirements of this section by a funded self-insurance program.

Prince George's County Code, 1972

Sec. 4-230

> "[a] building permit shall not be issued under the provisions of the Basic Code and of this Subtitle unless and until there has been full compliance with the applicable requirements contained therein, and with all statutes, ordinances and

regulations containing provisions related to and essential to the safety, health, sanitation and welfare of the occupants or future occupants of any building, structure or premises; such as, but not restricted to . . . the Sewerage Disposal Ordinance . . ."

BUILDING

Sec. 4-242. Section 128.0.

Section 128.0 titled "Board of Appeals" is amended to read as follows:

"SECTION 128.0.BOARD OF APPEALS.

"128.1. Application for Appeal. The owner or occupant of a building or structure or any directly aggrieved person may appeal to the Board of Administrative Appeals from a final decision of the Building Official refusing to grant a modification of the provisions of the Basic Code or of this Subtitle. Application for appeal may be made when it is claimed that the true intent of the Basic Code or of this Subtitle has been incorrectly interpreted or applied. Notice of such appeal shall be in writing and filed within thirty (30) days after the decision is rendered by the Building Official. * * *"

"128.2. Decisions of Board of Administrative Appeals.

"The Board of Administrative Appeals, when so appealed to and after a hearing, may vary the application of any provision of the Basic Code or this Subtitle to any particular case when, in its opinion, the enforcement thereof would do manifest injustice, and/or would be contrary to the spirit and purpose of

the provisions herein or the public interest, or when, in its opinion the interpretation of the Building Official shall be modified or reversed. A decision of the Board to vary the application of any provision of this Code or to modify an order of the Building Official shall specify in what manner such variation or modification is made, the conditions upon which it is made, and the reasons therefor. Every decision of the Board of Administrative Appeals shall be final; subject, however, to such remedies as any aggrieved party might have at law or equity. It shall be in writing, and shall indicate the vote upon the decision. Every decision shall be promptly filed in the office of the Building Official, and shall be open to public inspection: a certified copy shall be sent by mail or otherwise delivered to the appellant.

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

HERSCHEL BLUMBERG 6505 Belcrest Road Hyattsville, Maryland	*	
and	*	
MARVIN BLUMBERG 6505 Belcrest Road Hyattsville, Maryland	*	
Plaintiffs	*	
vs.	*	Equity No. D-7901
WILLIAM W. GULLETT former County Executive for Prince George's County Courthouse Upper Marlboro, Maryland	*	
and	*	
WINFIELD M. KELLEY, JR. County Executive for Prince George's County Courthouse Upper Marlboro, Maryland Successor to County Executive, William W. Gullett	*	
and	*	
PRINCE GEORGE' COUNTY, MARYLAND, a body politic Courthouse Upper Marlboro, Maryland	*	

SERVE: Joseph Casula, Esquire*
County Attorney *
Courthouse *
Upper Marlboro, Md. *
*
and *
*
WASHINGTON SUBURBAN SANITARY *
COMMISSION *
4017 Hamilton Street *
Hyattsville, Maryland *
*
SERVE: John T. Bonifant, *
Secretary *
4017 Hamilton Street *
Hyattsville, Maryland *
*
and *
*
CLARK M. BRESSLER *
JULIA O. BRESSLER Intervenor*
3900 Underwood Street *
University Park, Maryland *
*
and *
*
JAMES B. MADDOX Intervenor*
6811 Adelphi Road *
University Park, Maryland *
*
and *
*
The Zoning Coordinating *
Committee *
6811 Adelphi Road Intervenor*
University Park, Maryland *
*
Defendants *

AMENDED BILL OF COMPLAINT FOR INJUNCTIVE AND DECLARATORY DECREE AND ANCILLARY DAMAGES

Plaintiffs, Herschel Blumberg and Marvin Blumberg, by their attorneys, Linowes and Blocher, sues the Defendants, William W. Gullett, former County Executive; Winfield M. Kelley, Jr., present County Executive for Prince George's County; Prince George's County, Maryland, a body corporate and politic, hereinafter referred to as "County"; the Washington Suburban Sanitary Commission, (hereinafter referred to as the "WSSC"), Clark M. Bressler and Julia O. Bressler; James B. Maddox and The Zoning Coordinating Committee, alleging as follows:

* * *

14. That on March 29, 1973, Plaintiffs began clearing and grading for the Plaza Tower Apartments on part of Parcel A.

15. That on March 30, 1972, Plaintiffs in good faith began full construction of Plaza Towers pursuant to the building permit hereto-

fore issued by Prince George's County and pursuant to other permits and licenses issued by applicable governmental authorities, including the WSSC.

16. That subsequent to January 25, 1973, the date on which the building permits were issued and continuing through April 12, 1973, Plaintiffs have at all times diligently and in good faith pursued the construction of Plaza Towers Apartments on part of Parcel A.

17. That Plaintiffs act as their own general contractor and have awarded major subcontracts and purchase orders for Plaza Towers Apartments totalling Two Hundred Eighty-Three Thousand Eight Hundred Sixty-Nine Dollars ($283,869.00), which subcontracts and purchase orders have been actually executed by Plaintiffs and Plaintiffs have paid said subcontractors $283,869.00. The following major subcontract trades were actively working on the Plaza Tower Apartments:

1. Excavation

2. On-site sewer, water and storm drain

3. Concrete footings and foundations

18. That as of this date, Paintiffs have personally borrowed a total of Two Hundred Fifty-Eight Thousand Eight Hundred Twenty-Nine Dollars ($258,829.00) to meet expenditures incurred in the planning and construction of the Plaza Towers.

19. That the sum of Four Hundred Seventy-Nine Thousand Two Hundred Thirteen Dollars ($479,213.00) has been expended by Plaintiffs for planning, fees, materials and labor on Plaza Towers, this amount representing monies paid and costs incurred for preparation of plans, actual improvements made on part of Parcel A including, but not limited to, clearing, grading, installation of water and sewer lines, erection of special site conditions, installation of storm drainage lines, installation of foundations, building pads, engineering lay-

outs, concrete slabs, pouring of concrete, test borings and soil analysis, equipment rentals and other physical labor and materials stored on site.

20. That on April 12, 1973, the County served Plaintiffs with a Notice of Violations, requiring that construction of Plaza Towers cease and desist and effectively suspending the building permit heretofore issued to Plaintiffs. A copy of the Notice of Violation is attached hereto and made a part hereof as Exhibit "F".

* * *

26. That the Plaintiffs, subsequent to April 12, 1973, received a letter dated April 12, 1973 from the County stating that the Plaintiffs "may visit the Permits Office . . . to amend the permit application to list a properly licensed contractor . . . Following your amendment to the permit application to satisfy the legal requirements, the permit will be validated and a new issue date inserted." The

letter is attached hereto and marked as Exhibit "H".

27. That the Plaintiffs have amended the building permit application as directed by the County's letter of April 12, 1973 (Exhibit "G") by inserting a "legally licensed" contractor, but the Defendants Gullett and County refuse to re-issue the building permit to Plaintiffs.

* * *

30. That on April 11, 1973, acting on unidentified oral reports that the Plaintiffs' building permit for Plaza Towers would be withdrawn by Mr. Gullett, the WSSC adopted an Order suspending "the efficacy of" Plumbing Permit Numbers 381286 and 381287. The Order is attached hereto and marked as Exhibit "I".

31. That on May 8, 1973, the Plaintiffs caused to be filed with the County a permit application to permit the construction of a high-rise apartment consisting of two 27-story towers on the subject property in lieu of the previously approved development of a 35 and 27

story tower apartment, said application having been filed upon representation by the Defendant Gullett that a building permit would be issued if the height of the 35-story building were reduced accordingly. The Department of Licenses and Permits of Prince George's County commenced the processing of this later application by assigning to it permit number 1697-72-CG, the same number as was originally issued to the Plaintiffs, and by designating the application as "Revised".

* * *

33. That on May 30, 1973, the Sanitary Commission revoked Plumbing Permit Numbers 381286 and 381287 and effectively denied public sewer service to the Plaintiffs for Plaza Towers.

34. That the County has refused to issue or re-issue any building permits to the Plaintiffs as a result of the action of the WSSC revoking the Plumbing Permit Numbers 381286 and 381287.

35. Plaintiffs have acquired vested rights in Building Permit No. 1597-72-CG in that substantial expenditures have been made as hereinbefore set forth, and the attempt by Defendants to revoke said building permit and cause construction of the Plaza Towers to be discontinued constitutes the denial of due process and equal protection under the Constitution and Laws of the State of Maryland and of the United States of America and amounts to a taking of Plaintiffs' private property without compensation.

36. Plaintiffs have obtained vested rights in the house connection and plumbing permits issued by Defendant, WSSC, in that substantial expenditures have been made as hereinbefore set forth, and the attempt by WSSC to suspend said permit constitutes a denial of due process and equal protection of the Constitution and Laws of the State of Maryland and of the United States of America and amounts to a taking of Plaintiffs' private property without

compensation.

37. Plaintiffs are without an adequate administrative remedy or an adequate remedy at law and will suffer immediate and irreparable harm and damages if the relief prayed in this Bill of Complaint is not granted.

38. Plaintiffs are incurring ongoing costs during the period of construction if Plaza Towers is not allowed to continue. Furthermore, any subcontract agreements executed by Plaintiffs will be in jeopardy and Plaintiffs will be potentially liable for added costs of such subcontract agreements. Moreover, Plaintiffs will be unable to continue ordering materials and entering into additional subcontract agreements for the construction of the Plaza Towers and will suffer substantial and actual damages as a result thereof.

39. That the action of Defendants will cause Plaintiffs to suffer loss of future incomes and damages to their business reputations

and to the image of the proposed development of the subject property.

40. That due to the revocation of Plaintiffs' building permit and water and sewer permits, Plaintiffs were not able to enforce their various contracts with subcontractors, resulting in the cost to construct this same apartment building to increase at the rate of 10% to 12% per year; that as of 1976, the cost to construct this apartment building has increased from a total construction cost of $20,000,000 in 1973 to a cost of $26,000,000 in 1976; that the cost of construction continues to rise at the rate of 10% to 12% per year with no indication in the construction industry that the increase in cost will cease or slow down.

* * *

42. The aforegoing allegations set forth an actual and justiciable controversy between Plaintiffs and Defendants, and further sets forth circumstances of grievous damages to Plaintiff requiring urgent remedial action by

this Court.

43. Further, in light of the irreparable harm that Plaintiffs are suffering and will continue to suffer due to the Defendants' wilfull misuse of governmental power, Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs respectfully pray:

1. That this Court issue an injunction strictly enjoining and prohibiting the Defendants or any of them, (a) from refusing to reissue Plaintiffs' building permit; (b) from enforcing the Notice of Violation; (c) continuing the suspension of the sewer or water permits; or (d) otherwise interferring [sic] with the construction by Plaintiffs of the Plaza Towers Apartments, provided that Plaintiffs otherwise comply with the laws, rules, orders and regulations of Prince George's County.

2. That this Court hold a prompt hearing on the merits of this Amended Bill of Complaint for Injunctive and Declaratory Decree that the Stop Work Order is void and unenforceable, that

the suspension of the water and sewer permits is void and unenforceable and further issue a permanent and mandatory injunction strictly prohibiting and enjoining the Defendants, or any of them, from refusing to re-issue Plaintiffs' building permit, attempting to enforce the Stop Work Order, suspending the sewer or water permits, or otherwise interferring [sic] with the construction of the Plaza Towers Apartments, provided that Plaintiffs otherwise comply with the laws, orders, rules, laws and regulations of Prince George's County.

3. That this Court award Plaintiffs compensatory damages from the Defendants in the amount of $4.5 million, said damages being the proximate result of the delays encountered by Plaintiff due to the Defendants' refusal to re-instate Plaintiffs' building permit and water and sewer permit as required by law.

4. That the Court award Plaintiffs punitive damages against the Defendants in the amount of $500,000 for Defendants' wilfull and

deliberate misuse of government power through the acts of its agents and officials.

5. That this Court grant such other and further relief as the nature of this case may require.

LINOWES AND BLOCHER

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Charles G. Dalrymple

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* * *

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No. 80-807

IN THE

Supreme Court of the United States

October Term, 1980

HERSCHEL BLUMBERG, *et al.*
Petitioners,

v.

PRINCE GEORGE'S COUNTY, MARYLAND, *et al.*
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the decision of Maryland's highest court dismissing the instant civil action for failure to exhaust statutorily prescribed administrative remedies, consistent with Maryland law, constitutes an adequate state ground of decision rendering further review by this Court unnecessary.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

CONCLUSION 11

TABLE OF AUTHORITIES

Cases: **Page**

Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752 (1974) 10

Arnold v. Prince George's County, 270 Md. 384, 311 A.2d 223 (1973) 10

Bogley v. Barber, 194 Md. 632, 72 A.2d 17 (1950) 10

Bradshaw v. Prince George's County, Maryland, 284 Md. 294, 396 A.2d 255 (1979) 5

Continental & Western Air v. Koppal, 345 U.S. 653 (1953) 9

Fahey v. Mallonee, 332 U.S. 245 (1947) 7

PREVIOUS PAGE WAS BLANK

Gingell v. Board of County Comm'rs.,
249 Md. 374, 239 A.2d 903 (1968) 9, 10, 11

Hamm'erstein v. Superior Court,
341 U.S. 491 (1951) 8

Harbor Island Marina v. Calvert Co.,
286 Md. 303, 308 A.2d 738 (1970) 7

Henry v. Mississippi,
379 U.S. 443 (1965) 7, 8

Katz v. WSSC,
284 Md. 503, 397 A.2d 1027 (1979) 4

Lichter v. United States,
334 U.S. 742 (1948) 9

Michigan v. Tyler,
____U.S. ____, 98 S.Ct. 1942 (1978) 8

Orr v. Orr,
____ U.S. ____, 99 S.Ct. 1102 (1979) 8

Parrot v. City of Tallahassee, Florida,
381 U.S. 129 (1965) 8

Reiling v. Comptroller,
201 Md. 384, 94 A.2d 261 (1953) 9

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) 8

White v. Prince George's County,
282 Md. 641, 387 A.2d 260 (1978) 9

Statutes and Ordinances:

Article 25 A, Section 5 (U)
Maryland Annotated Code (1957, 1973 Repl. Vol.) 2, 6

Article X, Section 1013,
Prince George's Charter 2, 5

Section 4-230,
Code of Prince George's County, (1972) 2, 6

Section 4-242, §§ 128.1 and 128.2
Code of Prince George's County, (1972) 2, 5, 6

Section 2-117,
Code of Prince George's County, (1972) 2, 6

IN THE

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October Term, 1980

No. 80-807

HERSCHEL BLUMBERG, *et al.*
Petitioners,

v.

PRINCE GEORGE'S COUNTY, MARYLAND, *et al.*
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

JURISDICTION

Respondents submit that this case provides no ground on which to invoke the jurisdiction of this Court.

CONSTITUTIONAL PROVISIONS STATUTES AND ORDINANCES

Listed below are citations to statutes and ordinances respondents believe are relevant to a consideration of the Petition for Certiorari. Because of their length, respondents would refer the Court to the text as set forth in the petitioner's Appendix at pages 296-313. Section 2-117, Code of Prince George's County, (1972), which is *not* included in the Appendix, is set forth verbatim below.

Statutes:

	Petitioners' App.
Article 25 A, Section 5(U), Maryland Annotated Code (1957, 1973 Repl. Vol.)	297

Ordinances:

Article X, Section 1013, Prince George's County Charter	312
Section 4-242, § 128.1 and 128.2, Code of Prince George's County, (1972)	313
Section 4-230, Code of Prince George's County, (1972)	312

Code of Prince George's County, (1972):
Section 2-117.
Board of Administrative Appeals.

> There is created a Board of Administrative Appeals for the County, to hear and determine all administrative appeals allowed by ordinance

or law, with the exception of appeals under Section 27-460 of the Zoning Ordinance and appeals from decisions of the Personnel Board which shall be heard by the Circuit Court for the County and appeals by owners or occupants of multi-family rental facilities from decisions and order of the Director of the Department of Licenses and Permits as to the interpretation, application, and enforcement of the Landlord-Tenant Commission.
(Gen. Reso. No. 2-1968, § 2; as amended by Bill No. CB-15201972. 11/27/72.)

STATEMENT OF THE CASE

Respondents respectfully call the Court's attention to the following facts which should be considered in addition to those presented in Petitioners' Statement:

The Blumbergs' application for a building permit was never amended to show that the Blumbergs were licensed Residential Building Contractors. Therefore an inspection of this application by the Building Inspector on April 12, 1973, would not indicate that the contractors, the Blumbergs, were licensed Residential Building Contractors. More importantly, when the Blumbergs commenced construction on March 29, 1973, they were aware of the requirement for a Residential Building Contractor's license, and were also aware that they did not have such a license.

The initial suspension of the Blumbergs' plumbing permits by the WSSC was based on information it had received from an aide to the County Executive that the County would be invalidating the building permit. (As noted by the Court of Appeals of Maryland, it was the

normal practice of the County to notify the WSSC of the withdrawal of building permits.) (Petitioner' App. 8) However, on May 30, 1973, the WSSC revoked the Blumbergs' plumbing permits on the grounds that they had been erroneously issued by the WSSC and that the WSSC lacked the facilities to handle the new sewage which would be generated by the building.

The law of Prince George's County, Maryland, required that for the Blumbergs to obtain and retain a building permit, they must be in compliance with all other laws, including those pertaining to sewage disposal. If a contractor didn't have a plumbing permit from the WSSC, he couldn't have a building permit from the County. Although the WSSC's suspension of the Blumbergs' permits on April 11, 1973 could arguably be attributed to the County,[1] the WSSC's revocation of the permits on May 30, 1973, was based on reasons peculiar to the structure and operation of the WSSC and totally unrelated to the County. In any event, the County, absent one possible circumstance, was not authorized by its own law to allow the continuation of the Blumbergs' building permits after April 11, 1973.

The only legally prescribed remedy immediately available to the Blumbergs on and after April 12, 1973 and May 30, 1973, was an appeal to the Board of Appeals, which was empowered by County Ordinance to vary any provision of the subtitle dealing with building permits when enforcement would do manifest injustice, and/or would be contrary to the spirit of the law or the public interest, or when in the Board's opinion the Building Inspectors interpretation of the law should be modified or re-

[1]It has been the County's position throughout these proceedings that it cannot be liable for any action of the WSSC, an agency of the State of Maryland, which is not, as a matter of law, under the control of the County. *Katz v. WSSC,* 284 Md. 503, 397 A.2d 1027 (1979).

versed.[2] Hence, the Board of Appeals was empowered, in the exercise of its discretion, to order the County to reissue the Blumbergs' building permits absent the Residential Building Contractors license required by the County law and even absent the plumbing permits required by the WSSC Code. The Blumbergs, however, never noted an appeal to the Board of Appeals.

Rather, in July 1973, the Blumbergs filed a Bill of Complaint in the Circuit Court for Prince George's County seeking injunctive relief against the County in the form of reissuance of the building permits. Much later, in October 1976, the Blumbergs amended the Bill of Complaint to seek monetary damages which were alleged to have accrued as a result of the delay attendant to completion of the project.[3] As it was not until 3½ years after they lost their building permit that the Blumbergs sought damages, there is no genuine issue of a concurrent right of action for damages at the time the Blumbergs were obliged to exhaust their administrative remedies, i.e., April-May 1973.

Contrary to the assertion in Petitioners' Statement of the case, there was no specific finding of malice by the trial court on the part of respondent Gullett, in fact the absence of such a finding was a basis of respondents' initial appeal of the trial court's decision.[4] Also contrary to the assertion

---

[2]Code of Prince George's County, Maryland, Sec. 4-242, Section 128.2 (1972).

[3]In discussing the delays attendant to this litigation the Court of Appeals of Maryland noted that despite Petitioners' request for a speedy resolution of the issues, the case was not tried until five years after its institution, and petitioners nine times sought suspension of the Maryland Rule of Procedure providing for dismissal of a case for non-prosecution. (Petitioners' App. 12).

[4]Under Maryland law a public official, i.e., the County Executive, is immune from tort liability for non-malicious acts. *Bradshaw v. Prince George's County, Maryland,* 284 Md. 294, 396 A.2d 255 (1979). Article X, § 1013, Prince George's County Charter.

of petitioners that their remedy before the Board of Appeals was doubtful or inadequate is the absence in the record of any evidence to indicate that the Board of Appeals would not have reviewed their appeal impartially, and the legislation cited in petitioners' appendix[5] indicates that the Board of Appeals could have furnished the Blumbergs precisely the relief they sought in the Circuit Court, i.e., return of their building permits.

REASON FOR DENYING THE WRIT

The Court of Appeals of Maryland ruled that the trial court should not have assumed jurisdiction over the case as the Blumbergs had failed to exhaust their exclusive, statutorily prescribed administrative remedy to protest the County's action in regard to their building permits. While the Blumbergs have argued in support of their Petition for Writ of Certiorari that the applicable sections of the Prince George's County Code did not allow them to appeal the actions of the Building Inspector to the Board of Appeals of Prince George's County, Maryland, the Court of Appeals of Maryland has stated that as a matter of Maryland law, such an appeal was allowed.[6] Petitioners cannot, therefore, argue that the administrative remedy was doubtful, unknown, or inadequate, as the Court of Appeals has in its opinion delineated the procedures which were available and stated that these procedures are ex-

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[5]Code of Prince George's County, Maryland, Sec. 4-242, Sec. 128.2 (1972). (Petitioners' App. 313).

[6]The statutes establishing this remedy are Article 25A, § 5(U), Maryland Annotated Code (1957, 1973 Repl. Vol.); Section 2-117, Code of Prince George's County (1972); Section 4-242, § 128.1 and 128.2, Code of Prince George's County (1972) and Section 4-230, § 101.2, Code of Prince George's County (1972).

clusive and mandatory. The Blumbergs seek to rely on the exception to the doctrine of exhaustion of administrative remedies that exists when the administrative agency cannot provide a remedy. They did not argue below that the scheme of appeal provided by the County's ordinances is unconstitutional and may not assert such a challenge now for the first time.[1] The Blumbergs claim really breaks down into a complaint as to the application of a valid statutory scheme of administrative appeal to a particular situation, which is not sufficient grounds to ignore the requirement that administrative remedies be exhausted before resort to the courts is allowed. *Harbor Island Marina v. Calvert Co.*, 285 Md. 303, 308, 407 A.2d 738 (1970). However, the opinion of the Court of Appeals, being the definitive statement of Maryland law on the issue of availability of an administrative remedy, precludes petitioners from claiming before this Court that no administrative remedy existed.

This Court has previously declined to review cases raising allegations of violation of constitutional rights based on the "adequate state grounds doctrine." This Court stated in *Henry v. Mississippi*, 379 U.S. 443 (1965):

> It is of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions. The principle applies not only

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This Court has refused to make an exception to the doctrine of exhaustion of administrative remedies based on assertions of unlikelihood of success before the administrative agency. *Fahey v. Mallonee*, 332 U.S. 245 (1947).

[1] The Court of Appeals expressly noted that the Blumbergs contentions did not include a direct attack upon the legislation creating the administrative remedy. (Petitioners' App. 17-19).

> in cases involving state substantive grounds, Murdock v. City of Memphis, 20 Wall. 590, 22 L.Ed. 429, but also in cases involving state procedural grounds. Compare Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S.Ct. 459, 462-463, 89 L.Ed. 789 with Davis v. Wechsler, 263 U.S. 22, 44 S.Ct. 13, 68 L.Ed. 143, 397 U.S. at 446.

If the decision is based on state substantive law, this Court has reasoned that since a determination of alleged federal questions would not affect its disposition, review of constitutional issues not addressed below is barred. *Id. Orr v. Orr* ____ U.S. ____, 99 S.Ct. 1102, 1110 (1979). Where the decision below rests on an interpretation of state procedural law, its "adequacy" has been determined in several ways. For example, defaults in state proceedings will prevent review of alleged federal rights if ". . . the State's insistence on compliance with its procedural rule serves a legitimate state interest," or the state rule is a reasonable one clearly announced to the parties and counsel. *Henry v. State of Mississippi, supra,* 379 U.S. at 447, 448. *See also, Michigan v. Tyler,* ____ U.S. ____, 98 S.Ct. 1942, 1951 (1978); *Orr v. Orr, supra,* 99 S.Ct. at 1109. Also, this Court has indicated that adequacy would be found to exist if the state procedural rule is not novel and has been consistently applied by the state court both in the past and in the case at issue. *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229, 233-234, 244-245 (1969); *Hammerstein v. Superior Court,* 341 U.S. 491, 492-493 (1951). Finally, this court has indicated that *jurisdictional* procedural default provide more adequate state grounds than non-jurisdicational. *Sullivan v. Little Hunting Park, supra,* 396 U.S. at 233-234; *Parrot v. City of Tallahassee, Florida,* 381 U.S. 129 (1965).

This Court has held that failure to exhaust administrative remedies as required under either federal or state law will bar the Court's review by certiorari of the merits of alleged federal issues. In *Continental & Western Air v. Koppal*, 345 U.S. 653 (1953), this Court dismissed an employee's suit for reinstatement where the Missouri high court had determined that the employee failed to exhaust administrative remedies under his contract as required by Missouri law. Though the Court noted exhaustion might not be required in similar circumstances in another state, the Missouri court's ruling was consistent with previous application of the doctrine in that state.

Likewise, in *Lichter v. United States*, 334 U.S. 742 (1948), this Court refused to review the merits of three petitions for certiorari because of a proper Court of Appeals ruling that the three petitioning companies had failed to exhaust administrative remedies. The companies attempted to secure a redetermination of excess profits charged to them under the Renegotiation Act, but had failed to apply within the required time before the War Contracts Price Adjustment Board and subsequently to the tax court, as required by Congress. This Court excluded from consideration (1) the amount of the profits and other comparable issues which might have been presented to the tax court, (2) and even the issue of whether or not the act covered these contracts in the first place. *Id.* 334 U.S. at 792-793.

The decision of the Court of Appeals of Maryland was a reasonable and consistent application of the State's long established doctrine of exhaustion of administrative remedies.[9] The Court of Appeals detailed the procedures

[9]Among the many Maryland cases which state rule are: *White v. Prince George's County*, 282 Md. 641, 387 A.2d 260 (1978); *Gingell v. Board of County Comm'rs.*, 249 Md. 374, 239 A.2d 903 (1968); *Reiling v. Comptroller*, 201 Md. 384, 94 A.2d 261 (1953).

and remedies to be followed, noting that the legislature had both designated review by the Board of Appeals as the exclusive remedy and provided for appeal of the decision of the Board of Appeals to the Circuit Court and thence to the Court of Special Appeals of Maryland.

This Court and the Maryland Courts have, with consistency, narrowly defined the term "inadequacy of administrative remedy." This Court has held that the "inadequacy" exception is not one of convenience or ready application, but rather, that it requires a strong showing of (1) inadequacy and (2) impending harm incident to delay. *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 773, 774 (1974). Here the inadequacy claim has been thoroughly refuted by a consideration of the powers of the Board of Appeals, and the Blumbergs can surely make no valid claim of impending harm incident to delay when they did not file their initial Bill of Complaint until after the time for noting an appeal to the Board of Appeals had run.

The Blumbergs, lastly, have attempted to bootstrap themselves into an exception to the doctrine of exhaustion of administrative remedies by alleging that the actions of the County in regard to their building permit was actionable as an unconstitutional taking of property. This is contradictory to the established law of Maryland that the Courts will not allow a claimant to bypass the administrative process, particularly when judicial review is provided (as was the case here), simply by raising the claim of an unconstitutional taking of property. *Arnold v. Prince George's County*, 270 Md. 385, 311 A.2d 223 (1973); *Gingell v. County Comm'rs., supra; Poe v. Baltimore City*, 241 Md. 303, 216 A.2d 707 (1966); *Bogley v. Barber*, 194 Md. 632, 72 A.2d 17 (1950). This provision

of Maryland law is neither novel nor unreasonable, and its application to the instant case serves the legitimate purpose of preventing the courts from being called upon to decide matters that would never arise if the prescribed administrative remedy was followed. *Gingell v. County Comm'rs., supra.*[10]

CONCLUSION

For the reasons stated, the Writ of Certiorari should be denied.

Respectfully submitted,

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[10]It is not clear from the petition whether or not the Blumbergs seek a review of the Court of Appeals' decision affirming the dismissal of Kelly and Gullett as individual defendants. That decision does not decide or involve any federal issue. The Court of Appeals, Court of Special Appeals and trial court all determined that, as a matter of *substantive* Maryland tort law, neither the Bill of Complaint nor the Amended Bill of Complaint contained sufficient factual allegations to state a cause of action against either defendant. Since the Blumbergs had failed to properly plead their case after two voluminous Bills of Complaint, the trial court exercised its reasonable discretion, as determined by two appellate courts, to dismiss Kelly and Gullett and prohibit further amendment.